DOCKET

No. 87-259-CFX
Status: GRANTED

Title: Jonna R. Lingle, Petitioner
v.
Norge Division of Magic Chef, Inc.

Docketed:
August 14, 1987

Court: United States Court of Appeals
for the Seventh Circuit

See also:
87-859
87-924

Counsel for petitioner: Levy,Paul Alan

Counsel for respondent: Jackson,Charles C., Kimmel,R. Michael

Entry	Date	Note	Proceedings and Orders
1	Aug 14 1987	G	Petition for writ of certiorari filed.
2	Sep 14 1987		Brief of respondent Norge Division of Magic Chef in opposition filed.
4	Sep 14 1987	X	Brief amicus curiae of Minnesota filed.
3	Sep 16 1987		DISTRIBUTED. October 9, 1987
5	Sep 17 1987	X	Reply brief of petitioner Jonna R. Lingle filed.
7	Oct 2 1987		REDISTRIBUTED. October 9, 1987
8	Oct 2 1987		REDISTRIBUTED. October 9, 1987
9	Oct 13 1987		Petition GRANTED.
			**********
11	Nov 18 1987		Order extending time to file brief of petitioner on the merits until December 11, 1987.
12	Dec 11 1987		Joint appendix filed.
13	Dec 11 1987		Brief of petitioner Jonna R. Lingle filed.
14	Dec 11 1987		Brief amici curiae of Natl. Conference of State Legislatures, et al. filed.
15	Dec 11 1987		Brief amicus curiae of AFL-CIO filed.
18	Dec 11 1987		Brief amici curiae of Minnesota, et al. filed.
16	Dec 12 1987		Record filed.
		*	Certified copy of original record and C.A. proceedings received.
17	Dec 18 1987		Record filed.
		*	Certified original record received.
20	Dec 18 1987		Order extending time to file brief of respondent on the merits until January 23, 1988.
21	Jan 22 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
22	Jan 22 1988		Brief amicus curiae of Chamber of Commerce of the United States filed.
23	Jan 23 1988		Brief of respondent Norge Division of Magic Chef filed.
26	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 23, 1988. (1st case).
24	Feb 8 1988		CIRCULATED.
27	Feb 22 1988	X	Reply brief of petitioner Jonna R. Lingle filed.
28	Mar 21 1988		Lodging recieved.
29	Mar 23 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-259

No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

JONNA R. LINGLE,
Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

August 14, 1987

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 223-1220

QUESTION PRESENTED*

Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the state's workers compensation program, simply because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

---

*All parties to the proceeding in the court below are listed in the caption. In the court of appeals, this case was consolidated with another case, *Martin v. Carling National Breweries*, No. 86-1763 (7th Cir.), solely for purposes of *en banc* argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Statutes:

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-

JONNA R. LINGLE,
Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jonna R. Lingle petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is reported at 618 F. Supp. 1448, and is set forth at pages 48a to 51a of the appendix to this petition (App. 48a to 51a). The *en banc* decision of the court of appeals (there was no panel decision) is

not yet officially reported, and is reprinted at App. 1a to 47a.

JURISDICTION

The judgment of the court of appeals was issued on June 23, 1987. App. 52a-53a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ill. Rev. Stat. 1975, ch. 48, ¶ 138.4(h), provides:

> It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him or her by th[e Workers Compensation] Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT

A. Facts.

On December 5, 1984, petitioner Jonna R. Lingle notified respondent Norge Division of Magic Chef ("Norge") that she had sustained an injury while employed in its manufacturing facility at Herrin, Illinois, and asked, pursuant to the Illinois Workers Compensation Act, Ill. Rev. Stat. Chapter 48, Section 138.6, that Norge pay her medical bills. On December 11, 1984, Norge fired Lingle because it asserted that she had filed a false workers compensation claim.

The workers at Norge, including Lingle, were represented by Machinists Local 554, and were covered by a collective bargaining agreement which protected them against discharge without "just cause." Article 26, ¶ 26.2. The agreement contains a grievance and arbitration procedure, which applies only to "grievances," a term defined to mean disputes about "the effect, interpretation, application, claim of breach or violation of this Agreement," Article 7, ¶ 7.1. It also forbids the arbitrator to "add to, subtract from, or modify any of the terms of this Agreement, or to establish any conditions not contained in this Agreement." Article 8, ¶ 8.2. The Agreement makes the grievance and arbitration procedure the exclusive means of resolving a "grievance." Article 8, ¶ 8.5.

The same day that Lingle was fired, her union filed a grievance that denied Norge's assertion that her workers

compensation claim was false. It pointed out that Lingle was still under treatment by a doctor, and it noted that company policy required Lingle to report her injury. Thus, the union asked that she be reinstated with full seniority rights and back pay. When the case was initially argued in the court of appeals, a year and a half after petitioner's discharge, an arbitrator had been selected, but no hearing had yet been held on her grievance. Thereafter, the arbitrator ruled that Lingle's discharge was contrary to the contractual just cause requirement. However, because the relief available under the contract is not as great as the relief to which Lingle is entitled under state law, Lingle continues to press this action based on the Illinois retaliatory discharge doctrine.[1]

B. Proceedings Below.

On July 9, 1985, when her grievance had been pending for nearly seven months, petitioner filed a complaint against Norge in the Illinois Circuit Court for Williamson County, alleging that she had been discharged solely because she had exercised her rights under the workers compensation laws of Illinois, and claiming that such discharges were forbidden by Illinois law. On August 21, 1985, Norge removed the case to the United States District Court for the Southern District of Illinois on the basis of diversity jurisdiction, 28 U.S.C. §§ 1332 and 1441, and on

[1] Under state law, Lingle could be awarded punitive damages, which were not sought and could not be awarded in the arbitration. Moreover, the collective bargaining agreement provides for the award of back pay at "down time" rates, instead of fully compensatory levels based on the amount of work, including overtime, that Lingle actually lost because of her discharge. Article 26, ¶ 26.2. Finally, Lingle contends that she is entitled to additional relief under Illinois law because the job to which she was reinstated was not as desirable as the one that she held before she was fired.

September 16 it moved to stay the proceeding pending arbitration, or in the alternative to dismiss the action for lack of subject matter jurisdiction. Norge's theory was that Lingle's only remedy for her discharge was to pursue the grievance and arbitration procedures set forth in the collective bargaining agreement.

In opposition, Lingle argued that her rights under Illinois law did not depend in any way on the provisions of her union contract, and that there was thus no basis for relegating her to the contractual remedies. She noted that in *Midgett v. Sackett-Chicago,* 105 Ill.2d 143, 437 N.E.2d 1280 (1984), the Illinois Supreme Court had held that the state tort remedy for retaliatory discharge, which had previously been created in a case involving nonunion employees, applies to unionized employees as well, and that employees need not exhaust their contractual grievance remedies before asserting their rights under state law. Rather, it held, the state has an important interest in providing prompt protection from unscrupulous employers to all employees who choose to assert their rights under its workers compensation law. 105 Ill.2d at 154.

Nevertheless, the district court held that the complaint should be dismissed because Lingle's claim was preempted by section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. It decided that Lingle's claim was similar to that in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), where this Court held that section 301 preempted an employee's suit based on the tort of bad faith denial of contractual benefits. Despite the fact that, unlike the plaintiff in *Allis-Chalmers,* a plaintiff under the Illinois retaliatory discharge doctrine need not allege or prove a violation of the collective bargaining agreement, the district court stated that petitioner's state law claim is "inex-

tricably intertwined" with the contractual provision forbidding discharge without just cause. App. 50a. It also asserted that allowing such a claim would change the legal consequences of contract violations, and hence would upset the mechanisms devised by the contract for redressing such violations. *Id.* Accordingly, it dismissed the complaint. App. 51a.

A divided *en banc* court affirmed.[2] The majority, in an opinion authored by Judge Flaum, agreed with the district court that a finding of preemption was required by *Allis-Chalmers v. Lueck, supra.* The majority concluded that a worker who invokes a state law forbidding retaliatory discharges is necessarily complaining that the discharge lacked "just cause." Because the collective bargaining agreement forbids discharges without just cause, the court concluded that a plaintiff in a retaliatory discharge case is *necessarily* invoking a contractual right whose resolution depends on an analysis of the terms of the contract. App. 24a-25a. The majority responded to petitioner's argument that Illinois law permits a finding of retaliatory discharge without any interpretation of the contract, by stating that, in order to determine whether a state tort claim is intertwined with a contract, a court must analyze the scope of the contract, not the scope of the tort. App. 28a. Otherwise, the majority feared, states could "circumvent the arbitration and grievance procedures envisioned by the Congress as exclusive" by defining their torts to avoid any need to construe the contract. App. 28a-29a. Finally, the majority opined that, because a retaliatory discharge claim required a court to decide "if the employee would have been discharged absent the state-law-proscribed motive," it would necessarily have to decide whether the nonproscribed motive constituted just cause under the collective bargaining agreement. App. 29a.

[2] The case was initially argued before a three-judge panel, but, before a decision had been issued, the court of appeals *sua sponte* ordered reargument *en banc*. The case was argued together with *Martin v. Carling National Breweries,* No. 86-1763, which raised not only the preemption issue, but also the question of whether a state retaliatory discharge complaint could be removed to federal court simply because the defendant intended to invoke a preemption defense. That issue is not presented in this case because removal here was based on diversity of citizenship. Although petitioner objected to removal in the court of appeals, she does not seek certiorari on the court of appeals' ruling that removal was proper. App. 12a-15a.

In dissent, Judge Ripple, joined by Judge Cudahy, accused the majority of relying on its "own predilections" and disregarding this Court's controlling precedent. App. 40a. They focused on *Allis-Chalmers,* in which this Court decided that the state claims there were preempted, but also cautioned that preemption would not apply to "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." App. 41a, *quoting* 471 U.S. at 212. Moreover, they pointed out that this Court had previously dismissed, for want of a substantial federal question, an appeal from a decision by the Hawaii Supreme Court that the Railway Labor Act did not preempt that state's retaliatory discharge cause of action. App. 46a n.5, *citing Pan American World Airways v. Puchert,* 472 U.S. 1001 (1985).

Turning to the specific claims asserted here, Judge Ripple noted that petitioner asserted no rights under the contract; her claims neither depended on rights established by the contract, nor even required reference to the contract. App. 43a. Moreover, Judge Ripple observed, the majority had ignored the state's strong interest in protecting all employees, union and nonunion alike, who seek to exercise their rights under its workers compensation program.

App. 44a. Finally, he reasoned that even if an employer seeks to justify the discharge as having been motivated by nonretaliatory reasons, there is no danger of the court becoming entangled in contract questions because, under state law, it does not matter whether the alleged nonretaliatory reason is itself forbidden by the contract: so long as the reason was nonretaliatory, the employee loses the state court suit. App. 45a. As the dissent concluded, the majority's holding amounted to a conclusion that, by simply including a "just cause" provision in a collective bargaining agreement, employers could "preclude[ ] state enforcement of important state governmental interests" pertaining to an unlimited variety of employment related subjects. App. 46a.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND SEVERAL CIRCUITS, AND RAISES AN IMPORTANT QUESTION OF LAW THAT THIS COURT SHOULD RESOLVE.

1. The question of whether federal labor law, in conjunction with the "just cause" provisions contained in almost every collective bargaining agreement, preempts the application of general state laws against retaliatory discharges to unionized employees, is one which has vexed the lower courts and produced sharp differences in the results reached. The Eighth Circuit, like the decision below, has decided that state retaliatory discharge claims are preempted.[3] The Second, Third and Tenth Circuits have ruled

[3] *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986). *See also Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (state law invasion of privacy claim held preempted by section 301 because propriety of search and subsequent discharge could have been grieved under collective bargaining agreement).

against preemption.[4] The Ninth Circuit initially held that retaliatory discharge claims were not preempted, although a more recent decision upheld preemption of the state claim of an employee who had refused work based on an inaccurate understanding of state law.[5] And several state supreme courts, including the Supreme Court of Illinois, have decided that the state claims are not preempted.[6]

Indeed, given the Seventh Circuit's *en banc* holding in the companion case to this one, that an employer may remove a case to federal court simply by asserting the defense of preemption, the effect of the decision under review is to preclude the Illinois state courts from hearing cases which their own high court has commanded them to consider. This conflict will ultimately have to be resolved by this Court, and given the number of lower courts which have already considered it, there is no reason to wait any longer before deciding the preemption question which is cleanly presented here.[7]

[4] *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987); *Herring v. Prince Macaroni*, 799 F.2d 120, 124 n.2 (3d Cir. 1986); *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981). *Accord, Messenger v. Volkswagen of America*, 585 F. Supp. 565 (S.D. W.Va. 1984); *Benton v. Kroger Co.*, 640 F. Supp. 1317 (S.D. Tex. 1986).

[5] *Compare Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984) (no preemption), *with DeSoto v. Yellow Freight Systems*, 811 F.2d 1333 (9th Cir. 1987), *rehearing denied*, Nos. 85-6608 and 86-5800 (July 20, 1987) (preemption).

[6] *E.g., Gonzalez v. Prestress Engineering Corp.*, 503 N.E.2d 308 (Ill. 1986), *cert. denied*, No. 86-1505 (June 26, 1987); *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), *app. dism.*, 472 U.S. 1001 (1985); *MGM Grand Hotel-Reno v. Insley*, 728 P.2d 821 (Nev. 1986).

[7] Unlike most of the other preemption cases, which were removed from state courts solely on the ground that the preemption defense conferred jurisdiction on the federal court, the district court had jurisdiction of petitioner's case based on diversity of citizenship.

(footnote continued)

2. Review is also warranted because the majority below completely ignored decisions of this Court which run contrary to its holding in this case. To begin with, the court of appeals ignored those portions of *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), that firmly support Illinois' right to provide a retaliatory discharge cause of action for union as well as nonunion workers. The plaintiff in *Allis-Chalmers* had advanced a number of state law claims that were all found to be variations on his claim that his rights under the applicable collectively-bargained disability plans had been violated. The Court held that all such claims were preempted, despite the plaintiff's attempt to characterize them as founded in tort instead of contract, because in order to resolve the state law claims, the courts would have been required to decide plaintiff's rights under the collective agreement. The Court cautioned, however, that section 301 does *not* preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 471 U.S. at 212. Because petitioner's state law claim is independent of a labor contract, and because the right that she claims is one that would exist whether or not she were covered by a bargaining agreement, the court below acted inconsistently with *Allis-Chalmers* by denying Illinois the right to forbid her discharge.

Later in the 1984 Term, the Court twice reaffirmed this aspect of *Allis-Chalmers.* First, in *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), the Court cited *Allis-Chalmers* in support of its ruling that a state law setting minimum standards for group health insurance was

---

Undersigned counsel will soon file a petition for a writ of certiorari in a case which was summarily affirmed on the basis of the decision below, and which presents the removal as well as the preemption issue.

not preempted by either the National Labor Relations Act or a collective bargaining agreement. 471 U.S. at 755-756. But even more important, less than two months after *Allis-Chalmers* was decided, the Court dismissed, for want of a substantial federal question, an appeal from a decision of the Hawaii Supreme Court refusing to find preemption of a workers compensation retaliatory discharge claim. *Pan American World Airways v. Puchert,* 472 U.S. 1001 (1985), *dismissing appeal from Puchert v. Agsalud,* 677 P.2d 449 (Haw. 1984). The appeal was based solely on the claim that discharges could be remedied under the collective bargaining agreement and the accompanying grievance procedure, and thus any state claim was preempted by federal labor laws favoring exclusive use of that procedure. *See* Jurisdictional Statement, October Term, No. 83-1952, Questions Presented. Although the preemption urged in *Puchert* was based on the Railway Labor Act, that Act has at least as much preemptive effect as section 301 of the Labor-Management Relations Act, if not more. *Andrews v. Louisville & Nashville R. Co.,* 406 U.S. 320, 323 (1972). Because the majority opinion below overlooked these contrary decisions of this Court, all of which were cited by petitioner, review is warranted for that reason as well.

3. In cases of preemption, "the ultimate touchstone" is Congressional intent. *Allis-Chalmers, supra,* 471 U.S. at 208. Given the respect due to the states in our federal system, there is a strong presumption against finding Congressional intent to preempt state laws. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634 (1981). *See also California Federal v. Guerra,* 107 S. Ct. 683, 689 (1987). However, not only did the court below fail to consider whether Congress intended to preclude Illinois from providing a cause of action against retaliatory discharge to a

worker in Lingle's position, but in fact there is strong evidence that Congress did not so intend.

The basis for preempting petitioner's state cause of action was that the collective bargaining agreement provides protection against discharge without just cause and that it would be inconsistent with the collective bargaining agreement to provide either rights in addition to the just cause requirement, or a means of enforcing such additional rights. But the mere existence of parallel remedies is no basis for preemption. In fact, Congress has passed many laws that forbid retaliatory discharge and otherwise regulate the treatment of employees, and this Court has repeatedly held that those rights, and their enforcement mechanisms, exist independent of, and in addition to any rights under collective bargaining agreements. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Syst.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984). *See also Atchison, Topeka & S.F. Ry. v. Buell*, 107 S. Ct. 1410 (1987); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). The court below did not even mention this line of cases, upon which petitioner relied below and which point in a very different direction than the decision below.

Although all of the above cases involved federal statutes (with the exception of *Colorado Anti-Discrimination Commission*), while petitioner's claim is based on a state right, that distinction is irrelevant. The question in all preemption cases is Congressional intent, and there is no reason to believe that Congress would regard the provision of a judicial forum to enforce employee rights to be consistent with harmonious labor relations when those rights are based on federal law, but inconsistent with harmonious labor relations when the rights are based on state law. *Metropolitan Life, supra*, 471 U.S. at 755.

4. The law of retaliatory discharge is in a substantial degree of flux in most states. States are also developing their own views of whether unionized employees should be denied protections afforded to other employees, and instead relegated to whatever protections their unions can obtain by negotiation or arbitration. We believe that it is highly inappropriate for the federal courts to limit the states in the development of this area of the law by holding, without any evidence whatsoever, that Congress intended to freeze the status quo, at least where unionized workers are concerned.

Whether Congress intended to preclude the states from protecting the workplace rights of union as well as non-union employees, on the theory that the law of the collective bargaining agreement essentially supersedes any protections which the state may choose to provide, presents an extremely important question both of federal labor relations law and of federalism generally. The Court should therefore grant review in this case in order to better define the limits which federal law imposes on state exercise of the police power with respect to the workplace rights of employees who are represented by a union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

August 14, 1987

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-2971 and 86-1763

JONNA R. LINGLE,

Plaintiff-Appellant,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Defendant-Appellee.

AND

PAMELA S. MARTIN,

Plaintiff-Appellant,

v.

CARLING NATIONAL BREWERIES, INC., a foreign corporation, G. HEILEMAN BREWING COMPANY, INC., a foreign corporation, d/b/a CARLING NATIONAL BREWERIES, JOHN SNYDER, and CHARLES RHEIN,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Illinois, East St. Louis Division.
Nos. 85 C 4426 & 85 C 3321—**James L. Foreman**, *Chief Judge.*

ARGUED MAY 28, 1986 and NOVEMBER 6, 1986
CONSOLIDATED and REARGUED *en banc* APRIL 29, 1987—
DECIDED JUNE 23, 1987

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* These cases present issues of extreme importance affecting workers covered by collective bargaining agreements. We must decide whether a claim of retaliatory discharge, a claim of intentional interference with an employment contract, and a claim that certain discharge procedures are defective, are preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982).[1] We conclude that § 301 preempts these state claims, and therefore affirm the judgments of the district court.

I.

A.

The facts underlying *Lingle* are not disputed. The plaintiff, Lingle, was an employee of the defendant Norge Division of Magic Chef, Inc., and was covered by a collective bargaining agreement. The agreement was effective during the period in which Lingle's dispute arose.

On December 5, 1984, Lingle notified her employer that she had sustained an injury while employed at its facility in Herrin, Illinois. The plaintiff, relying on the Illinois Workers' Compensation Act, requested that Norge pay her medical bills. On December 11, 1984, Norge fired the plaintiff on the ground that she had filed a false worker's compensation claim. Lingle asserts that she was discharged solely in retaliation for exercising her worker's compensation rights.

Article 26 of the collective bargaining agreement provided that an employee could not be discharged except

[1] Section 301(a) broadly vests jurisdiction in the federal courts over all suits for "violation[s] of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." 29 U.S.C. § 185(a) (1982). Jurisdiction is bestowed "without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.*

for just cause.[2] The agreement also contained, in Article 8.5, mandatory arbitration and grievance procedures that were to be the exclusive remedy for all disputes. The same day that Lingle was fired, the union filed a grievance on plaintiff's behalf denying Norge's assertion that her worker's compensation claim was false. She has successfully arbitrated that claim, and received reinstatement and back pay.

On July 9, 1985, Lingle filed suit in the Circuit Court for Williamson County, Illinois. In her complaint, she alleged that she had been discharged in violation of Illinois law.

On August 21, 1985, Norge removed the case to federal court on the basis of diversity. On September 16, 1985, Norge moved to stay the proceedings in the district court or, in the alternative, to dismiss the case for lack of subject matter jurisdiction. Norge's theory was that the claim was preempted. The plaintiff argued that her claim was independent of any rights or remedies contained in the collective bargaining agreement.

The district court, relying on *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985), held that Lingle's retaliatory discharge claim was preempted by § 301, because it was inextricably interwined with the collective bargaining agreement. The district court, concluding that her claim was a § 301 claim, dismissed the case for failure to exhaust the grievance and arbitration procedures provided by the collective bargaining agreement. *See Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985).

[2] Article 26.2 of Lingle's collective bargaining agreement provides in part:

> [T]he right of the employer to discharge or suspend an employee for just cause is recognized.

B.

The facts underlying *Martin* are somewhat in dispute. The plaintiff was an employee of the defendant Carling National Brewery, and was covered by a collective bargaining agreement. The collective bargaining agreement was negotiated between the Teamsters Local Union No. 50 and G. Heileman Brewing Company, and was effective from August 4, 1979, through November 27, 1983.

On June 26, 1983, the plaintiff was injured in Cellar No. 7 at the Carling National Brewery located in Belleville, Illinois. The injury occurred in the course of her employment. Thereafter, on June 28, 1983, the plaintiff was discharged. Martin alleges that she was discharged for expressing her intent to file a worker's compensation claim. Subsequently she did file such a claim. On June 30, 1983, a meeting was scheduled between the plaintiff and Charles Rhein, the industrial relations manager of the defendant G. Heileman Brewing Company, to discuss plaintiff's discharge. The plaintiff did not attend this meeting.

Article XVI of the collective bargaining agreement, the termination of seniority clause, provided that an employee could not be discharged or disciplined except for just cause.[3] Article XI contained mandatory arbitration and grievance procedures. Rather than follow these procedures, the plaintiff filed an eleven-count civil action on June 27, 1985, in the Circuit Court for St. Clair County, Illinois. In the first four counts she requested compensatory and punitive damages on the ground that she was discharged solely because she had stated her intention to exercise her rights under the Illinois Workers' Compensation Act. Count V was directed against an employee, John Snyder, for intentional interference with her employment contract with the G. Heileman Company. This count, like counts I through IV, made no reference to the collective bargaining agreement, but rather alleged that a contractual relationship beyond the collective bargaining agreement existed between plaintiff and the G. Heileman Company.

[3] Article XVI of Martin's collective bargaining agreement provides in part:

> No employee who has completed the probationary period and attained regular full time status shall be discharged or disciplined except for just cause.

Counts VI and VII of the complaint were directed against defendant Rhein for negligently and willfully failing to correctly implement discharge procedures. Counts VIII and IX were against Carling National Brewery and the G. Heileman Company, respectively, alleging the same theory of liability as counts VI and VII on the ground that the two companies were responsible for the actions of their agent Rhein. Counts X and XI contained the same allegations as counts VIII and IX, but requested punitive damages. Counts VI through XI made no reference to the collective bargaining agreement.

On August 14, 1985, the defendants removed the case to the United States District Court for the Southern District of Illinois, alleging that the plaintiff's claim was based upon § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982). Removal was asserted under 28 U.S.C. § 1441, on the basis that the district court had original jurisdiction pursuant to 29 U.S.C. § 185(a).

Plaintiff filed a motion to remand pursuant to 28 U.S.C. § 1445(c), which provides that:

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

Martin argued that none of the counts in her complaint were removable, or in the alternative, that counts I through IV should be severed and remanded as required by § 1445(c).

On January 21, 1986, the district court denied the plaintiff's motion to remand. Relying on his prior decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 618 F. Supp. 1448 (S.D. Ill. 1985), Judge Foreman found that all eleven counts were preempted by § 301, because they were "in-

extricably intertwined with considerations of the terms of [the] collective bargaining agreement and its provisions which provide for termination only upon just cause." *Martin v. Carling National Breweries, Inc.*, No. 85-3321 (S.D. Ill. Jan. 21, 1986) (order denying remand). On April 11, 1986, the district court dismissed the plaintiff's lawsuit because of, *inter alia*, the plaintiff's failure to exhaust the grievance and arbitration machinery provided by the collective bargaining agreement.

II.

On these appeals we must decide whether the plaintiffs' claims were removable, and if so, whether they were preempted by § 301. In order to determine removability we must examine, as a matter of federal law, the nature of the plaintiffs' claims. We briefly discuss the development of the tort of retaliatory discharge in Illinois to aid our determination of whether federal law encompasses the plaintiffs' claims.

The Supreme Court of Illinois first announced the tort of retaliatory discharge in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The Illinois court established this cause of action, which it labeled as a "tort," 384 N.E.2d at 358, for those workers who were fired because they filed worker's compensation claims. The court limited the application of its decision to at-will employees who, the court felt, were otherwise subject to an employer's absolute power to terminate. *Id.* at 357. The court stated that the purpose of this tort was to uphold and implement the public policy of the Workers' Compensation Act of Illinois, Ill. Rev. Stat. ch. 48, ¶¶ 138.1-138.30 (1986).[4] *Kelsay*, 384 N.E.2d at 357. The court did not,

[4] The court noted that:

> [T]he legislature enacted the workman's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be

(Footnote continued on following page)

however, characterize this new cause of action as an addition to the worker's compensation laws.

"The dual emphasis in *Kelsay* upon the public policy underlying the Workers' Compensation Act, and the plight of the at will employee created uncertainty about the scope of the retaliatory discharge tort." *Comment, Retaliatory Discharge—Illinois' Extension of Retaliatory Discharge Tort Actions to Employment Relationships Governed by Collective Bargaining Agreements: New Obstacles Imposed By Federal Labor Law Preemption*, 1985 S. Ill. L. Rev. 707, 709 (footnote omitted). This uncertainty was resolved in *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S.Ct. 278 (1985), in which the court held that an employee covered by a collective bargaining agreement could file suit against an employer if the employer had discharged the employee in retaliation for seeking benefits under the Workers' Compensation Act. The court reasoned that unless it extended its judicially created tort remedy to employees covered by collective bargaining agreements, an employer, who was a party to a collective bargaining agreement, could only be obligated to give back pay, and could not be held liable for punitive damages for violating an important public policy of the State of Illinois. *Midgett*, 473 N.E.2d at 1284. The Illinois court further held that extending the cause of action to such employees would not have an adverse effect on congressionally favored grievance and arbitration procedures. *Id.* However, the court expressly declined to reach the issue of federal preemption.

Midgett was reaffirmed in *Boyles v. Greater Peoria Mass Transit Dist.*, 113 Ill. 2d 545, 499 N.E.2d 435, 439 (1986). The *Boyles* court held that an employee who is

[4] *continued*

> seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act.

Kelsay, 384 N.E. 2d at 357.

covered by a collective bargaining agreement may bring a retaliatory discharge suit against a public entity employer, even though the public entity is not subject to an award of punitive damages. *Boyles*, 499 N.E.2d at 439. The Illinois Supreme Court, once again, did not discuss the effect of federal preemption on the state tort claim.

Most recently, the Illinois Supreme Court in *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308 (1986), was faced directly with the issue of whether the tort of retaliatory discharge is preempted by federal labor law. In both cases consolidated for review in *Gonzalez*, the employees were covered by a collective bargaining agreement that contained a just cause discharge provision. Both workers filed worker's compensation claims and were subsequently discharged. Instead of following the grievance procedures that were set forth in the collective bargaining agreement to challenge their discharge, the plaintiffs filed suit in state court alleging retaliatory discharge.

The Illinois Supreme Court, after discussing *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1986), held that the plaintiffs' retaliatory discharge claims were not preempted. The court distinguished two of its prior decisions that seemed to weigh against its holding.[5] The

[5] The Illinois Supreme Court in both *Koehler v. Illinois Central Gulf Railroad Co.*, 109 Ill. 2d 473, 488 N.E.2d 542, *cert. denied*, 106 S.Ct. 3297 (1986), and *Bartley v. University Asphalt Co.*, 111 Ill. 2d 318, 489 N.E.2d 1367 (1986), recognized situations in which certain workers, despite the public policy of the State of Illinois, could not assert a retaliatory discharge claim. In *Koehler*, the court held that the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982), preempted the tort of retaliatory discharge. *Accord Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (7th Cir. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1000 (1984). In *Bartley*, the Illinois Supreme Court once again limited the availability of the tort of retaliatory discharge. The court held that the plaintiff's state tort claim for civil conspiracy, which alleged that he was discharged in retaliation for cooperating with the Federal

(Footnote continued on following page)

court concluded that the claims were not preempted because the tort of retaliatory discharge was grounded in Illinois public policy, "which, regardless of the existence or absence of a collective-bargaining agreement, confers upon all employees and employers certain nonnegotiable rights and imposes certain nonnegotiable duties and obligations." *Gonzalez*, 503 N.E.2d at 312. Justice Ryan, in dissent, however, pointed out that "[w]hether or not one agrees that as a matter of State law 'just cause' includes retaliatory discharge is simply irrelevant. . . . Thus, a State court lacks authority to declare that as a matter of State law a given claim is or is not within the scope of the 'just cause' provision." *Id.* at 315 (dissenting opinion).

With this background and understanding of the tort of retaliatory discharge in Illinois, we now reach the merits of the parties' contentions.

III.

A.

A federal court may not, of course, address the merits of a claim without first determining whether it has jurisdiction. Accordingly, when a case is removed to federal district court under 28 U.S.C. § 1441(b)[6], the court must

[5] *continued*
Bureau of Investigation, was inextricably intertwined with the terms of his labor contract, *id.* at 1373, and was, therefore, preempted, *id.* at 1373-74 (*citing Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985) and *Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985)). In *Gonzalez*, however, the court distinguished both *Koehler* and *Bartley* on factual grounds.

[6] Section 1441 provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

(Footnote continued on following page)

be assured that the claim arises under the Constitution, treaties, or laws of the United States. Only after a court finds that it has jurisdiction may it reach the merits.

In *Martin*, the district court discussed the preemption issue and then found it had jurisdiction. The *Martin* court apparently reasoned that if the claim was preempted by § 301, the court necessarily had jurisdiction. Although the district court reached the correct result, it decided these issues in reverse order. In *Lingle*, the district court addressed only the preemption issue.

Because of the confusion surrounding the proper approach to a § 301 preemption claim that is removed to a district court, we now set forth the proper analytical framework. *See Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805-06 (June 9, 1987); Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 Geo. Wash. L. Rev. 812 (1986) (hereinafter "Twitchell"). A federal court must first determine whether it has jurisdiction. In a case originally brought in a state court, this requires the federal court to determine whether the suit was properly removed. Then, and only then, may a court determine whether or not federal law preempts the state cause of action.[7] To decide the preemption issue, before deter-

[6] *continued*
district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441 (1986).

[7] This is also the Supreme Court's approach. For instance, in *Franchise Tax Board v. Construction Laborers Vacation Trust*,

(Footnote continued on following page)

mining whether proper jurisdiction exists, is to allow the tail to wag the dog. We have in several cases followed the correct approach, although without expressly setting forth the proper analytical framework. *See, e.g., Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985).

Our analysis will follow several steps. We begin with the principle that, because a federal court must always determine its own jurisdiction *de novo*, state court characterizations of a claim are not binding on the federal court. Thus, even if a state views a cause of action, such as retaliatory discharge, as part of its worker's compensation laws, 28 U.S.C. § 1445(c), which precludes the removal of state worker's compensation actions, would not necessarily bar removal. Based upon this principle, we find that, in this case, 28 U.S.C. § 1445(c) is not a bar to removal. We then discuss the general principles of removal jurisdiction and note that a federal court may, in some

[7] *continued*
463 U.S. 1, 103 S.Ct. 2841 (1983), the Court stated, in referring to *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235 (1968), that:

> [In *Avco*] the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Id., 463 U.S. at 24, 103 S.Ct. at 2853-54 (footnote omitted) (emphasis in original); *see also Caterpillar Inc.*, 55 U.S.L.W. at 4806 ("The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA.").

situations, look beyond the face of the complaint to determine whether a plaintiff has artfully pleaded her suit so as to couch a federal claim in terms of state law. We conclude that, in these cases, the plaintiffs' claims actually arose under federal law and are therefore removable. The next step is to determine whether federal law preempts the plaintiffs' claims. We discuss the differences in the types of labor law preemption, conclude that the preemption cases that discuss § 301 are controlling, and hold that the plaintiffs' claims are preempted. Finally, we hold that, because the plaintiffs did not exhaust their administrative remedies, dismissal of each suit was proper.

B.

A suit may be removed to federal district court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 574 (7th Cir. 1982). Under § 1441(b) a defendant may remove a cause of action presenting a federal question to a federal court without regard to diversity of citizenship. *Mitchell*, 772 F.2d at 344. However, § 1445(c) limits § 1441 by barring the removal of a suit if it arises under the worker's compensation laws of a state.

The plaintiffs argue that section 1445(c) of Title 28 of the United States Code bars the removal of their retaliatory discharge claims, because these claims arise under the Workers' Compensation Act of Illinois. We must first determine, therefore, whether or not § 1445(c) bars the removal of the plaintiffs' retaliatory discharge claims. We conclude that § 1445(c) does not bar removal of the plaintiffs' claims, because each plaintiff has asserted a claim for breach of the collective bargaining agreement and not a worker's compensation claim. *See Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511, 517 (7th Cir. 1985) ("In view of the fact that the employee has a cause of action for breach of the collective bargaining agreement, the claim does not arise under the Indiana Workman's Compensation Act, and thus federal jurisdiction is not barred under 28 U.S.C. § 1445(c).").

Section 1445(c) was passed to help ease the burden on the federal court dockets. S. Rep. No. 1830, 85th Cong., 2d Sess. 7-8, *reprinted in* 1958 U.S. Code Cong. & Admin. News 3099, 3106. Congress apparently felt that removal of state worker's compensation claims to federal court would nullify the "expedit[ious] and inexpensive" procedures that the states had set up. *Id.* at 8, *reprinted in* 1958 U.S. Code Cong. & Admin. News at 3106. It was Congress' intent that "the workman [have] the option to file his case in either the Federal or the State court. If he files in State court it is not removable to the Federal court." *Id.* Section 1445(c) thus bars removal of all worker's compensation claims. *See, e.g., Alexander v. Westinghouse Hittman Nuclear, Inc.*, 612 F.Supp. 1118 (N.D. Ill. 1985) (§ 1445(c) bars removal even if diversity exists); *Thomas v. Kroger Co.*, 583 F.Supp. 1031 (S.D. W.Va. 1984).

The plaintiffs claim that, as a matter of state law, their retaliatory discharge claims arise under the Illinois Workers' Compensation Act. Although the Illinois Supreme Court has stated that its purpose in creating the retaliatory discharge cause of action was to protect the public policy concerns that underlie the Illinois Workers' Compensation Act, it has referred to retaliatory discharge as a tort. *See Kelsay*, 384 N.E.2d at 358.

Even if the Illinois courts had labeled the tort of retaliatory discharge as one arising under the Illinois Workers' Compensation Act, thus ostensibly barring removal under § 1445(c), that determination would not necessarily be binding on this court.[8] *See Standard Oil Co. of Califor-*

[8] This, of course, holds equally true for state statutes. *See, e.g.*, Ill. Rev. Stat. ch. 48, ¶ 138.4(h) (1986) (retaliatory discharge for filing a worker's compensation claim unlawful). Thus, neither a state legislature nor state courts may interfere with the federal labor law scheme.

(Footnote continued on following page)

nia v. Johnson, 316 U.S. 481, 483, 62 S. Ct. 1168, 1169 (1942). This is because the meaning of "workmen's compensation laws" in § 1445(c) is a matter of federal law, regardless of the label a state may give an action. This would hold true even if a state, as some do, classified retaliatory discharge as a breach of contract claim. *See, e.g., Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). If retaliatory discharge is classified as a contract claim, the collective bargaining agreement would clearly be implicated. As we recently said: "The state cannot be allowed, merely by the label it attaches to the cause of action, to interfere with the administration of a federal statute." *Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341, 1345 (7th Cir. 1985); *see Allis-Chalmers v. Lueck*, 471 U.S. 202, 218 n.13, 105 S.Ct. 1904, 1915 n.13 (1985). If the Illinois court's determination of the claim in this case were binding upon this court, the entire federal framework of collective bargaining would be undermined. That is, the burden of resolving labor disputes would be shifted to the courts, rather than being resolved by arbitration, thus frustrating the policy underlying the federal labor laws.

---

[8] *continued*

In *Gonzalez*, the Illinois Supreme Court stated:

> It bears noting that even if the labor contract covering Gonzalez and Repyak recited the rights and obligations arising under the Workers' Compensation Act and expressly provided that a discharge in contravention of the Act was without "just cause," the claims would still fall entirely outside the preemptive sphere of section 301. Neither an employer nor a union can strip an employee of the protections of Illinois law by merely restating the rights and obligations that arise thereunder in a private labor agreement.

Gonzalez, 503 N.E.2d at 313. We reject this reasoning. The Supreme Court has stated that whether a state tort claim is "sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law," *Lueck*, 105 S.Ct. at 1913; otherwise each state would be "free to decide what 'just cause' means or does not mean. . . ." *Gonzalez*, 503 N.E.2d at 316 (Ryan, J., dissenting).

A state court's characterization of a claim cannot be binding on a federal court not only because of the policy underlying the federal labor laws, *see Graf*, 790 F.2d at 1345, but also, and more important, because federal courts are courts of limited jurisdiction and have the duty to examine their jurisdiction *de novo* in each case. A state court can neither enlarge federal judicial power nor narrow it by characterizing a federal claim as a state claim. To do so would be to allow a state court to defeat a congressional directive. The determination of whether the tort of retaliatory discharge arises under federal law, and is therefore removable, is a federal question. *See Standard Oil Co.*, 316 U.S. at 483, 62 S.Ct. at 1169. We conclude that the plaintiffs' retaliatory discharge claims arise under federal law, so that § 1445(c) does not bar removal.[9]

We must next determine if the requirements of § 1441 are met. Section 1441(b) permits removal if the complaint raises a federal question. A federal court must, as a matter of federal law, examine a state claim *de novo* to determine whether it raises a federal question. Thus, while the nature of the state tort is a matter of state law, the question of whether the state tort is sufficiently independent of the collective bargaining agreement so as to avoid removal is a question of federal law. *See Lueck*, 471 U.S. at 213-14, 105 S.Ct. at 1912-13. Therefore, we must now decide, as a matter of federal law, whether the plaintiffs' retaliatory discharge claims actually arise under federal law.

One method for determining whether a claim arises under federal law is to apply the "well-pleaded complaint"

---

[9] Our view that the tort of retaliatory discharge is not a worker's compensation law is supported by the fact that, as a matter of federal law, worker's compensation laws provide limited no-fault compensation for an injury; this limit on damages is in exchange for the elimination of general tort rules and defenses. *See Larson, Workmen's Compensation* § 1.10 (desk ed. 1986). The Illinois tort of retaliatory discharge lacks, for purposes of § 1445(c), the essential elements of a worker's compensation law.

rule, which is one of the most basic principles of federal court jurisdiction. This rule provides that the "federal claim must generally appear on the face of the complaint unaided by any other pleadings, including a removal petition." *Oglesby*, 752 F.2d at 275. However, a necessary exception to the well-pleaded complaint rule is the "artful pleading" doctrine. This doctrine provides that, although a plaintiff is the "master" of his or her complaint, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22, 103 S.Ct. 2841, 2853 (1983), he or she may not purposely frame his or her action under state law and omit the federal questions that are essential to recovery. *Id.*; *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, No. 86-1397, slip op. at 6 (7th Cir. Apr. 14, 1987); *Williams*, 786 F.2d at 931; *Mitchell*, 772 F.2d at 344; *Oglesby*, 752 F.2d at 275.

In *Martin*, the defendants removed the plaintiff's suit to federal court on the basis that all of her claims arose under § 301.[10] In *Lingle*, the defendant removed the plaintiff's suit on the basis of diversity. Under the well-pleaded complaint rule, removal would not be proper in either case, because the plaintiffs have not stated a federal claim on the face of their complaints. However, the artful pleading doctrine requires us to look more closely at the plaintiffs' allegations. *See Williams*, 786 F.2d at 930-33; *cf. Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 12 (7th Cir. May 8, 1987) ("Appellants cannot, through 'artful pleading,' disguise claims that are within the jurisdictional scope of the RLA. . . ."). After examining the plaintiffs' state claims *de novo*, to determine

[10] "Section 301 confers original jurisdiction on the district courts over suits for violation of collective bargaining agreements negotiated by labor organizations and employers in industries affecting commerce." *Mitchell*, 772 F.2d at 344. For jurisdiction to be proper under § 301(a), it is necessary that the suit be based upon an alleged breach of the collective bargaining agreement, and that the resolution of the plaintiff's suit be governed by the terms of that agreement. *Williams*, 786 F.2d at 935.

whether a federal question is raised, we conclude that the plaintiffs' claims of retaliatory discharge, and Martin's other claims, are artfully pleaded claims for wrongful discharge under the collective bargaining agreements. Therefore, removal was proper, because both complaints stated claims that arose under federal law. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237 (1968) ("It is thus clear that the claim under th[e] collective bargaining agreement is one arising under the laws of the United States within the meaning of the removal statute. . . . It likewise seems clear that this suit is within the 'original jurisdiction' of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b).").[11]

C.

We have consistently held that claims of retaliatory discharge brought by a worker who is covered by a collective bargaining agreement are actually claims for wrongful discharge under the collective bargaining agreement. Therefore, these claims arise under federal law, and removal is proper.

[11] The Supreme Court recently has explained, in adopting the reasoning of *Avco* to ERISA claims, the difference between the ordinary situation where federal preemption is a defense to a plaintiff's suit and the special role federal preemption plays under § 301. *Metropolitan Life Insurance Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987).

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. . . . One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years, this Court has singled out claims pre-empted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, for such special treatment.

Metropolitan Life, 107 S.Ct. at 1546 (citations omitted); *see also Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805-06 (June 9, 1987).

In *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985), the plaintiff refused to perform his work because he had not been provided the necessary tools or clothing as required by OSHA. He alleged that he was discharged because of his refusal. We stated that:

> [The] plaintiff has simply alleged a cause of action for wrongful discharge and if shown to be in violation of a collective bargaining agreement subject to Section 301, LMRA, the action arises under federal law and the fact that it was not characterized in the complaint as a federal claim is not determinative.

Id. at 276 (citations omitted).

In *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), the employee was covered by a collective bargaining agreement that had a "just cause" provision. Vantine alleged, as have the plaintiffs here, that he was discharged in retaliation for filing a worker's compensation claim, and that this action interfered with his "employment contract rights." *Id.* at 515. The case was removed to the district court, because the complaint's theory of liability was based on § 301. *Id.* at 516.

We noted in *Vantine* that the Indiana Supreme Court had created a tort action for retaliatory discharge for at-will employees. *See id.* at 517 (*citing Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973)). We concluded that, "because the goals and policies of the Indiana Workmen's Compensation Act are protected by the collective bargaining agreement, *Frampton* does not apply to employees covered by collective bargaining agreements." *Id.* at 517. Although we discussed state law, we based our decision on our own review of whether the cause of action arose under state or federal law. We noted that "because an allegation for filing a workmen's compensation claim is an allegation of a breach of the collective bargaining agreement, it arises under . . . [§ 301] rather than the Indiana Workmen's Compensation Act," *id.* Similarly, in this case, although the plaintiff's claim is based on a state tort, it is actually a claim for a breach of the collective bargaining agreement.

Another case from this circuit, *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986), involved a plaintiff's claim of "tortious termination of employment." The plaintiff argued that "his involuntary resignation claim [could] not implicate the collective bargaining agreement . . . because the defendant did not discharge plaintiff, but sought to avoid the provisions of the collective bargaining agreement by forcing the plaintiff to resign involuntarily." *Mitchell*, 772 F.2d at 346. We concluded that plaintiff had given too narrow an interpretation to the just cause provision, and held that plaintiff's claim arose under the collective bargaining agreement, and therefore presented a federal question, making removal proper.

The case law in our circuit is clear: a claim of retaliatory discharge by a worker covered under a collective bargaining agreement with a "just cause" provision states a claim under the collective bargaining agreement. Lingle's and Martin's retaliatory discharge claims, therefore, necessarily arise under fede law. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957) (federal law governs § 301 claims).

Martin's other claims also arise under the collective bargaining agreement, and therefore are removable as § 301 claims. Count V alleges an interference with both her employment rights and contract of employment. Counts VI through XI allege that the defendants maintained a defective discharge procedure. We reject Martin's claim that an employment contract, separate and apart from the collective bargaining agreement, existed between her and the defendants. The only contract controlling her employment rights is the collective bargaining agreement. Thus, we conclude that Count V is artfully pleaded and arises under § 301. Counts VI through XI state claims that are subsumed by the discharge procedures of the collective bargaining agreement; therefore, these claims also arise under § 301 and are properly removable. All of the counts raised in Martin's complaint, therefore, require a determination of whether, under the collective bargaining

agreement, she was discharged for just cause. *See Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 10 (7th Cir. May 8, 1987) ("The appellants cannot escape the exclusive governance of the RLA by articulating their claim in terms of a state tort action."). Thus, federal law is controlling, and the suit was properly removed.

We conclude by holding that the first issue in a § 301 removal case is whether federal law provides a plaintiff with a cause of action to remedy the wrongs he or she asserts. *See Mitchell*, 772 F.2d at 344; *Oglesby*, 752 F.2d at 275. Once a court determines that a plaintiff's complaint—either on its face or as artfully pleaded—states a claim for a federal remedy, as in these cases, then the district court may conclude that removal is proper. The next step is for the court to determine whether or not the suit is preempted.

IV.

A.

The Supreme Court has articulated several distinct preemption principles in the context of the labor laws. One principle, the *Garmon* rule, prohibits the states from regulating activities that are protected, or prohibited, or arguably so affected, by the NLRA. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). *Garmon* preemption protects the primary jurisdiction of the National Labor Relations Board. A similar preemption principle precludes state regulation of conduct that Congress intended to be left unregulated. *See Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548 (1976).

We are concerned here with a preemption principle distinct from those above—the preemptive effect of § 301. *See Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957). This last type of preemption is based upon the necessary federal protection of a uniform body of federal labor law. *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04, 82 S.Ct. 571, 576-77 (1962). Consequently, unlike *Garmon*

preemption, which balances state and federal interests, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 n.9, 105 S.Ct. 1904, 1913 n.9 (1985), § 301 preemption requires that "incompatible doctrines of local law must give way to principles of federal labor law," *Lucas Flour*, 369 U.S. at 102, 82 S.Ct. at 576 (footnote omitted); *see also Lueck*, 471 U.S. at 212-13, 105 S.Ct. at 1912. The cases applying other labor law preemption principles are, therefore, irrelevant to our determination here. *See Gibson v. AT&T Technologies, Inc.*, 782 F.2d 686, 688-89 (7th Cir.), *cert. denied*, 106 S.Ct. 3275 (1986).

The Supreme Court has made clear that where the right to recovery depends on an interpretation of a collective bargaining agreement, § 301 requires federal law to govern. *Lincoln Mills*, 353 U.S. at 456, 77 S.Ct. at 918. In *Lucas Flour*, the Court stated that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." *Lucas Flour*, 369 U.S. at 103, 82 S.Ct. at 576. The Court thought a uniform federal law was required because:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

Lueck, 471 U.S. at 210, 105 S.Ct. at 1910-11 (*quoting Lucas Flour*, 369 U.S. at 103-04, 82 S.Ct. at 577).

A recent Supreme Court decision that has addressed the issue of the preemptive effect of § 301 is *Lueck*, *supra*.[12] In *Lueck*, the employee alleged that the employer had hindered his receipt of insurance proceeds as provided for in the collective bargaining agreement. The Court, in responding to the employee's argument that his claim was not preempted, stated that, "[w]ere state law allowed to determine the meaning intended by the parties in adopting a particular phrase or term, all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911. Building upon its decision in *Lucas Flour*, the Court concluded that:

> If the policies that animate § 301 are to be given their proper range, however, the preemptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective-bargaining] agreement' [be] defined by application of an evolving federal common law grounded in national labor policy.

[12] In *Lueck*, an employee was entitled to benefits under an insurance policy that was part of a collective bargaining agreement. The collective bargaining agreement provided that all disputes were subject to a grievance procedure which culminated in final and binding arbitration. The plaintiff alleged that his employer harassed him and then hindered his receipt of benefits for which he had applied. Instead of complying with the grievance procedures, Lueck filed suit in state court against his employer for bad-faith handling of his insurance claims. The trial court granted the defendant's motion for summary judgment, holding that the plaintiff had stated a claim under § 301. The Wisconsin Court of Appeals affirmed. The Supreme Court of Wisconsin reversed, holding that the suit did not arise under § 301 and was not preempted. The court reasoned that the plaintiff's claim was independent of the contract. The Supreme Court reversed, finding that the claim arose under § 301. The Court also held that § 301 preempted not only state contract claims, but also state tort claims.

Lueck, 471 U.S. at 210-11, 105 S.Ct. at 1911 (citation omitted) (brackets in original).[13]

Recently, the Supreme Court in *International Brotherhood of Elec. Workers v. Hechler*, 55 U.S.L.W. 4694 (May 26, 1987), has reaffirmed *Lueck* and *Lucas Flour*. In *Hechler*, the Court was faced with the issue of whether a union employee's state tort claim that her union had breached its duty of care to provide her with a safe working place was sufficiently independent of the collective bargaining agreement to avoid preemption. The Court concluded that it would have to interpret the collective bargaining agreement to determine whether the union had assumed that duty. The Court stated:

[13] The Court stated that:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 85 S.Ct. 614, 616, 13 L.Ed. 2d 580 (1965), as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Lueck, 471 U.S. at 219-20, 105 S.Ct. at 1915-16 (emphasis added).

The Court did, however, place limits on its holding.

> Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id., 471 U.S. at 212, 105 S.Ct. at 1912 (footnote omitted).

> In order to determine the Union's tort liability . . . a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U.S. at 218. The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action.

Hechler, 55 U.S.L.W. at 4697 (footnote omitted). *Compare Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804 (June 9, 1987) (employees' claim that employer breached individual employment contract did not implicate collective bargaining agreement and was not preempted).

B.

Plaintiffs' claims for retaliatory discharge depend on an analysis of the terms of the collective bargaining agreements. Moreover, Martin's other claims, those in counts V through XI of her complaint, are also inextricably intertwined, by their own terms, with her collective bargaining agreement. Both plaintiffs are seeking redress for a right that derives from the collective bargaining agreement. In *Graf*, we held that where a "worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, . . . that remedy is exclusive; the worker has no state remedies." *Graf*, 790 F.2d at 1346;[14] *see also Avco Corp. v. Aero*

[14] One district court has referred to this statement as "impermissibly overbroad." *La Buhn v. Bulkmatic Transport Co.*, 644 F.Supp. 942, 950 (N.D. Ill.), *appeal docketed*, No. 86-2664 (7th Cir.

(Footnote continued on following page)

Lodge No. 735, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237 (1968). That holding applies in this case as well, and is supported not only by *Lueck* but by the recent decisions in this circuit addressing the preemptive effect of § 301. The plaintiffs have, therefore, asserted state claims that are preempted by § 301.

The question of whether the tort of retaliatory discharge is preempted by the federal labor laws has been at issue in several recent cases in this court. *See, e.g., Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (1980) (A pendent state claim of retaliatory discharge is preempted by the Railway Labor Act.); *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985) (A claim for retaliatory discharge under Indiana law may not be asserted by workers covered under a collective bargaining agreement.). Moreover, the district courts in this circuit have been faced with this issue with increased frequency—although they have arrived at differing conclusions. *Compare Clark v. Momence Packing Co.*, 637 F.Supp. 16 (C.D. Ill. 1985), *appeal docketed*, No. 85-3165 (7th Cir. 1985) (finding the state tort of retaliatory discharge preempted) *and Waycaster v. AT&T Technologies*, 636 F. Supp. 1052 (N.D. Ill. 1986), *appeal docketed*, No. 86-1547 (7th Cir. 1986) (same) *and Hughes v. Pittsburgh Testing Lab*, 624 F.

[14] *continued*
1986). We believe that *Graf* was decided correctly in light of *Lueck*, and that the statement quoted above is the law in this circuit.

It is true, as the district court in *La Buhn* noted, that the tort of retaliatory discharge is based on Illinois public policy. Moreover, *Lueck* made it clear that § 301 does not allow the parties to contract for that which is illegal under state law. *Lueck*, 471 U.S. at 212, 105 S.Ct. at 1912. What the *La Buhn* court failed to understand is that where federal law provides a remedy (i.e., grievance procedures enforced through a collective bargaining agreement), and is meant to be exclusive, then overlapping or inconsistent state law must fall. We find this language in *La Buhn* to be inconsistent with both our previous decisions and with *Lueck*. The district courts in this circuit must, whether or not they agree with our reasoning or with the results we reach, follow our mandates.

Supp. 54 (N.D. Ill. 1985) (same) *and Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985) (same) *with La Buhn v. Bulkmatic Transport Co.*, 644 F.Supp. 942, 945 (N.D. Ill. 1986), *appeal docketed*, No. 86-2664 (7th Cir. 1986) (no preemption of the worker's tort of retaliatory discharge claim for filing a safety complaint) (*citing Orsini v. Echlin, Inc.*, 637 F.Supp. 38 (N.D. Ill. 1986)) *and Daugherty v. Lucky Stores, Inc.*, 603 F. Supp. 975 (C.D. Ill. 1985) (same).

The recent Seventh Circuit opinions that have addressed the preemptive effect of § 301 are consistent. In *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985), for example, this court held that the plaintiff's claim for wrongful discharge was preempted by the collective bargaining agreement.[15] In another case involving Indiana law, *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), we held that a claim for retaliatory discharge was an "allegation of a breach of the collective bargaining agreement," and consequently the claim was preempted by under § 301. *Vantine*, 762 F.2d at 517.

In another case, also decided after *Lueck*, we held that the plaintiff's "involuntary discharge" claim was preempted by § 301. *Mitchell v. Pepsi-Cola Bottlers Co.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986). We then stated that the "federal interest in uniformity of result under section 301 has produced a multitude of cases foreclosing suits based on state common law when the disputes underlying those suits turn on the terms of an agreement between parties to a labor contract," *id.*

In *Gibson v. AT&T Technologies*, 782 F.2d 686 (7th Cir.), *cert. denied*, 106 S.Ct. 3275 (1986), the plaintiffs brought suit under a state law fraud theory. They alleged

[15] At the time we decided *Oglesby*, the Indiana courts had not yet decided whether an employee under a collective bargaining agreement could sue for retaliatory discharge. However, our holding in *Oglesby* did not rest upon a prediction of how the Indiana courts would decide the issue.

that the defendant had improperly deprived them of a layoff allowance that was provided for in the collective bargaining agreement. Relying on *Oglesby*, we held that the plaintiffs' action arose from the collective bargaining agreement, and therefore, was controlled by federal law. *Gibson*, 782 F.2d at 688 (*citing Lueck*).

Most recently, we reiterated our views in *Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (7th Cir. 1986). In *Graf*, we relied on *Oglesby* for the proposition that "there is overwhelming support in the case law for complete preemption in collective bargaining cases." *Graf*, 790 F.2d at 1346. Although *Graf* was decided under the Railway Labor Act, we have previously held that the NLRA, including § 301 of the LMRA, has the same preemptive effect as the RLA. *See Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807, 816-17 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 1602 (1987).[16] *Graf* is, therefore, applicable to our cases.

[16] We have stated:

> Some cases do say that the Railway Labor Act occupies the field of labor relations in its domain even more completely than the National Labor Relations Act does in its, as shown by the fact that only the former Act requires that employment disputes be arbitrated. But when courts compare the preemptive scope of the two statutes in this way they have in mind the provisions of the NLRA that date back to the Wagner Act and create a regulatory scheme administered by the National Labor Relations Board; they are not referring to the entire NLRA, which includes amendments added by the Taft-Hartley Act in 1947 (and by later statutes), notably section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Section 301, which is just as much a part of the edifice created by the (amended) National Labor Relations Act as the parts of the Act enforced by the Labor Board, creates an exclusive federal remedy, judicially rather than administratively enforceable, for breaches of collective bargaining contracts. Where, as is true of more than 90 percent of such contracts, the contract establishes a grievance and arbitration remedy, that remedy becomes by force of section 301 exclusive, just like the arbitral remedies

(Footnote continued on following page)

Our holding is, therefore, mandated by prior cases in this circuit. We are mindful of the Supreme Court's admonition that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Lueck*, 471 U.S. at 220, 105 S.Ct. at 1916. Although it is also clear that the scope of § 301 preemption must be determined on a case-by-case basis, *id.*, we conclude that, in these cases, the plaintiffs' claims of retaliatory discharge are substantially dependent upon an analysis of the terms of the collective bargaining agreements. Therefore, these claims must be treated as § 301 claims that preempt state law.

The plaintiffs argue that the definition of retaliatory discharge in Illinois does not expressly require an interpretation of a collective bargaining agreement. They argue, therefore, that the tort is not inextricably intertwined with the federal labor laws. However, this reasoning is inverted; the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge. It is the scope of the contract that must be analyzed initially. To conclude otherwise, by analyzing the state tort first, would allow the states, through the guise of the worker's compensation laws, to circumvent the arbitration and grievance procedures envisioned by Congress

---

[16] *continued*
established by the Railway Labor Act. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). It is therefore hard to see why that Act should have more preemptive effect than the National Labor Relations Act.

Lancaster v. Norfolk & Western Railway Co., 773 F.2d 807, 816-17 (7th Cir. 1985) (citations omitted), *cert. denied*, 107 S.Ct. 1602 (1987); *see Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 10 ("While *Allis-Chalmers* is an LMRA case, its reasoning is equally applicable to the determination of whether a claim couched in terms of a state tort actually arises under an RLA collective bargaining agreement." (footnote omitted)).

as exclusive. *See Lueck*, 471 U.S. at 210-11, 105 S.Ct. at 1911; Twitchell, 54 Geo. Wash. L. Rev. at 814 n.8.

If the tort of retaliatory discharge were not preempted by § 301, then workers covered by collective bargaining agreements would be able to bring their claims in the state courts. However, a state court would be deciding precisely the same issue as would an arbitrator: whether there was "just cause" to discharge the worker. This also would hold true in a case involving a dual motive discharge (i.e., where an employer fires an employee both because of the employee's poor attendance record, and because the employee has filed a worker's compensation claim). In such a case, the state court would have to determine if the employee would have been discharged absent the state-law-proscribed motive, which in turn would depend on whether the nonproscribed motive constituted "just cause" under the collective bargaining agreement. Because a claim of retaliatory discharge clearly implicates the collective bargaining agreement, these claims should be resolved, as Congress clearly intended, by the grievance procedures in the agreements. Therefore, the state tort of retaliatory discharge is inextricably intertwined with the collective bargaining agreements here, because it implicates the same analysis of the facts as would an inquiry under the just cause provisions of the agreements.[17]

---

[17] We recognize that § 301 does not preempt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge. Section 301 does not preempt state anti-discrimination laws because Congress has expressly stated that state anti-discrimination remedies may exist within the framework of federal statutes that authorize multiple independent decisions. For example, Title VII and the ADEA speak with approval of the use of state remedies. *See, e.g.*, 42 U.S.C. §§ 2000e)-5(c) &-7 (1982); 29 U.S.C. § 633(a) & (b) (1982). In contrast, the LMRA gives no hint of approval or recognition of overlapping remedies for discharges. Therefore, *Lueck* is dispositive of this case, rather than analogies to statutes such as Title VII.

The plaintiffs also argue that the state has an interest in deterring retaliatory discharge, and that permitting plaintiffs to obtain punitive damages will facilitate this goal. We do not believe that the mere availability of punitive damages in state court should prevent preemption. Federal labor law is structured to make whole a worker who was unjustly fired. After a favorable arbitration decision, a worker can be reinstated with full back pay. If the collective bargaining agreement permits, an employee may even obtain punitive damages. *Howard P. Foley Co. v. International Brotherhood of Elec. Workers, Local 639*, 789 F.2d 1421, 1423-24 (9th Cir. 1986); *see Miller Brewing Company v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 912 (1985). Unlike a successful arbitration claim, a successful state tort claim does not ensure reinstatement. The mere possibility of punitive damages in a state court does not justify a holding that the tort involved here is not preempted. In the long run, more employers will be deterred from improperly discharging their employees by a strong arbitration system rather than by the mere possibility of punitive damages.

Finally, we note that a conclusion that state retaliatory discharge claims are not preempted would be detrimental to unions. If a state statute or common law gave all workers protection from unjustified discharges, then one of the major recruiting points of union organizers—that unionization will protect the worker against arbitrary discharge—would disappear. The effect of such a state system would be to make the worker less dependent on the arbitration remedies created by the collective bargaining contract.

We also conclude that Martin's other claims in counts V through XI, which concern either an alleged interference with the employment contract or an allegedly faulty dispute resolution system, are dependent upon the terms of the collective bargaining agreement. The claims in these last counts, like the retaliatory discharge claims, are inextricably interwined with the collective bargaining agreement.

C.

We are not the only circuit that has faced the issue of the preemptive effect of § 301 on various state claims, including the tort of retaliatory discharge. The Second, Third, and Tenth Circuits have concluded that § 301 does not preempt the state tort of retaliatory discharge; the Eighth Circuit has held that § 301 preempts such cases, while the direction of the Ninth Circuit cases is towards preemption. Although the other circuits have split over whether § 301 preempts these state law claims, we conclude that the better reasoned cases support our result.

In *Peabody Galion v. A. V. Dollar*, 666 F.2d 1309 (10th Cir. 1981), the plaintiffs, who were covered by a collective bargaining agreement, brought a retaliatory discharge suit against their employer. The court held that their claim, which was authorized under a state statute, was not preempted by the NLRA.

We decline to follow *Peabody Galion*. First, we note that it was decided prior to the Supreme Court's recent decision in *Allis-Chalmers v. Lueck*, in which the Court reaffirmed the broad preemptive effect of § 301. Second, we do not agree with the Tenth Circuit's analysis of the preemption issue. The Tenth Circuit applied preemption principles that were designed to protect the NLRB's primary jurisdiction, and not the preemption principles that govern § 301 cases. We do not believe that the scope of § 301 preemption should be determined under a balancing test that was adopted in cases that were concerned with the NLRB's primary jurisdiction. Finally, the *Peabody Galion* court did not believe that permitting workers covered by collective bargaining agreements to file retaliatory discharge claims would frustrate federal labor policy. *Id.* at 1317. In light of *Lueck*, we strongly disagree. We believe that permitting these suits will frustrate the federal policy favoring arbitration.

We also decline to follow a recent Third Circuit case, which has commented, in a footnote, on the preemptive effect of § 301 on a claim of retaliatory discharge. *See*

Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3d Cir. 1986). The *Herring* court concluded that § 301 did not preempt the retaliatory discharge claim, "[b]ecause worker's compensation rights are rooted in state law, rather than the collective bargaining agreement, and because the cause of action in question is part-and-parcel of the state's worker's compensation scheme." *Id.* at 124 n.2. We do not agree with this reasoning, in part because the court relied on *Peabody Galion*. Moreover, that a claim is a part of a state's regulatory scheme is of no import in the face of a superior federal law. Because § 301 preemption arises from Congress' plenary power under the Commerce Clause, Congress may preempt any state law that conflicts with a valid exercise of that power. The ultimate question is whether "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Lueck*, 471 U.S. at 220, 105 S.Ct. at 1916.

The Second Circuit has concluded that a claim of retaliatory discharge brought by an employee covered by a collective bargaining agreement is not preempted by § 301. *See Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987). In *Baldracchi*, the plaintiff alleged that she was discharged, in violation of a state statute, in retaliation for filing a worker's compensation claim. The Second Circuit concluded that because her claim was based upon a state statute, the plaintiff's claim was independent of the collective bargaining agreement. The court also concluded that the claim did not require an interpretation of the "just cause" provision. Finally, the court relied on reasoning similar to the *Herring* court's logic, which we believe to be erroneous, that even if the collective bargaining agreement permitted retaliatory discharge, the statutory rights could not be waived, so that the agreement would have no effect on the plaintiff's statutory rights.

We reject the Second Circuit's analysis of this issue.[18] The Second Circuit's analysis fails to take into account the fact that Congress can preempt a state statute. Thus, if a decision on the plaintiff's claim could be decided under the just cause provision of the collective bargaining agreement, then it is immaterial that the plaintiff's claim could also be decided with reference to the state statute. In fact, the *Baldracchi* court admitted that in determining the plaintiff's relief, reference would have to be made to the agreement. *Id.* at 106. We believe that the court in *Baldracchi* missed the real issue: that if resolution of a plaintiff's claim is substantially dependent on an interpretation of a collective bargaining agreement, then contrary state law—whether statutory or common law—must fall.

The Ninth Circuit has decided several cases concerning the preemptive effect of § 301 on various state torts. Although these cases are perhaps inconsistent, the more recent Ninth Circuit opinions support our view.

The Ninth Circuit's first major statement on the preemptive effect of § 301 was in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2319 (1985). There the court held that the plaintiff's state law cause of action for wrongful discharge, which was created to preserve the state's public policy, was not preempted by § 301.

The Ninth Circuit subsequently decided *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), which appears to have limited the holding in *Garibaldi*. In *Olguin*, the plaintiff alleged that he was fired in retaliation for filing safety complaints against his employer under OSHA regulations. *See also Scott v. Machinists Automotive Trades District Lodge No. 190*, 815 F.2d 1281, 1283 (9th Cir. 1987). The court distinguished *Garibaldi* and found that Olguin's claim was preempted by § 301 because his remedies were provided

[18] *See supra* note 8.

by his employment contract. The court seemed to undermine *Garibaldi* when it stated that the "tort of wrongful discharge has developed in some states to protect employee job security despite the historical common law rule of employment at will. *See Garibaldi*, 726 F.2d at 1374. As we have indicated, this tort is supplanted by the provisions of the collective bargaining agreement." *Olguin*, 740 F.2d at 1475.

Several recent cases from the Ninth Circuit have reinforced the *Olguin* decision. In *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir.), *aff'd*, 55 U.S.L.W. 4804 (June 9, 1987), the Ninth Circuit found that the plaintiffs' state law claims for breach of an employment contract were not preempted. *Williams* is not directly on point, because the plaintiff's breach of contract suit arose from contracts allegedly made during a period when the plaintiffs were not part of the bargaining unit, and thus the contracts were not within the scope of § 301. *See Caterpillar Inc.*, 55 U.S.L.W. at 4806 n.9. What is relevant, however, is that the Ninth Circuit in *Williams* seemed to read *Olguin* broadly, stating that "Olguin's wrongful discharge claim fits neatly within the scope of the 'just cause' discharge provisions of the collective bargaining agreement," *Williams*, 786 F.2d at 937. The *Williams* court also expressly questioned the rationale of *Garibaldi's* preemption discussion. *See id.* at 933-35. Another recent case with facts similar to *Garibaldi*, but reaching a different result, has questioned the conclusion in *Garibaldi*. *See Desoto v. Yellow Freight Systems*, 811 F.2d 1333 (9th Cir. 1987).

Similarly, the Ninth Circuit in *Bale v. General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986),[19]

[19] In *Bale*, the plaintiffs, who were hired as temporary employees, became concerned that no action had been taken recognizing them as regular employees. They filed a grievance with the union, but the union would not pursue it. They then filed suit in state court,

(Footnote continued on following page)

concluded that § 301 preempted various state claims, and cited *Olguin* for the proposition that federal law preempts state tort claims when those claims are really claims alleging violations of the collective bargaining agreement. *Id.* at 779. We conclude that the Ninth Circuit cases which were decided after *Lueck–Williams*, *Bale*, and *DeSoto*– more accurately point to the direction in which that circuit is moving, and support our holding. Thus, we do not believe that our holding is in conflict with the recent decisions of the Ninth Circuit.

A recent case, directly on point, that has addressed the preemptive effect of § 301 on a retaliatory discharge claim is *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986). In *Johnson*, the employee suffered an on the job injury. He was later discharged for allegedly violating posted safety rules. Johnson was covered by a collective bargaining agreement that prohibited discharge except for just cause, and which also contained arbitration and grievance procedures. Subsequently, after filing a grievance, Johnson filed suit in state court alleging, *inter alia*, retaliatory discharge for filing a worker's compensation claim. The Eighth Circuit affirmed both the district court's refusal to remand to state court and its grant of summary judgment for the defendants. The court concluded that the employee's claims were artfully pleaded and were really claims for wrongful discharge in violation of the collective bargaining agreement. Thus, the claims were substantially dependent upon an analysis of the agreement, and were, therefore, preempted by § 301. *See id.* at 797.

[19] *continued*

alleging breach of oral contract, fraud, negligent misrepresentation, and a § 301 claim for breach of the collective bargaining agreement. The case was removed to the district court, which found that the state claims were preempted. The court of appeals affirmed, holding that the plaintiffs' state claims were preempted.

D.

In this case we decide that, although federal law does not preempt all state law claims involving a provision of a collective bargaining agreement, where a plaintiff makes a claim for wrongful discharge, this claim necessarily implicates a just cause provision. Furthermore, we conclude that when a worker, who is covered under a collective bargaining agreement, claims that a defendant has interfered with her employment contract, or has maintained a defective dispute resolution procedure, these claims also stem directly from the collective bargaining agreement, and are therefore preempted.

V.

The final step is for this court to determine the proper disposition of the plaintiffs' suit. We conclude that as a matter of federal law, the plaintiffs' failure to exhaust their remedies under the collective bargaining agreement requires us to affirm both district court orders dismissing the plaintiffs' suit.

"The federal policy favoring private arbitration of labor disputes has induced courts to establish a requirement that employees suing under section 301 first exhaust their administrative remedies." *Mitchell*, 772 F.2d at 345 (*citing Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965)); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1488 (7th Cir. 1985); *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221, 1223 (7th Cir. 1985). Therefore, an employee must attempt to use the grievance procedures set forth in the collective bargaining agreement. *Maddox*, 379 U.S. at 652, 85 S.Ct. at 616.

In *D'Amato, supra*, we stated that an employee must exhaust the grievance and arbitration provisions of the collective bargaining agreement before he or she institutes suit, if those procedures are intended to be the exclusive remedy for breach of contract claims. *D'Amato*, 760 F.2d at 1488. We then discussed several exceptions to this rule. The first exception is where "the conduct of the employer

amounts to a repudiation" of the agreement procedures so that the employer is estopped by this conduct from asserting unexhausted agreement procedures as a defense to the suit. *Id.* (*citing Vaca v. Sipes*, 386 U.S. 171, 185, 87 S.Ct. 903, 914 (1967)); *see also Bailey v. Bicknell Minerals, Inc.*, No. 86-2448, slip op. at 4 (Apr. 27, 1987). The second exception, the futility exception, provides that an employee need not resort to the grievance procedures if such action would be futile. *D'Amato*, 760 F.2d at 1488. For example, this occurs "where those who would pass on the claims are the very individuals charged with violating the complaining employee's rights." *Id.* (*citing Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 331, 89 S.Ct. 548, 552 (1969)). The last exception excuses a worker from complying with the grievance procedures when a union is relieved, for some reason, of any duty to represent the worker. *Id.*

The district court in *Martin* found that although the plaintiff never filed a formal grievance, a meeting was scheduled to discuss her discharge. Martin failed to attend that meeting. The plaintiff argued in the district court that she was not obligated to exhaust these procedures, because she fell within the second exception outlined above.[20] Plaintiff clearly did not, however, prove that, in this case, the initiation of formal grievance procedures would have been futile.

In *Lingle*, the district court dismissed the plaintiff's claim, because she failed to exhaust her administrative remedies. The court reasoned that the grievance procedures in the contract were meant to be exclusive, that the union did not breach its duty of fair representation,

[20] The district court in *Martin* found that the plaintiff attempted to "escape the exhaustion requirement by contending that exhaustion would be futile because she knew of no successful grievance and because she was advised by a Teamsters Local Union official that the Union would not process her employment grievance with full and adequate representation." *Martin v. Carling National Breweries, Inc.*, No. 85 C 3321 (S.D. Ill. Apr. 11, 1986) (order granting defendants' motion for summary judgment).

and that the plaintiff's claim did not fall within any of the exceptions outlined in *D'Amato*.[21]

We agree with the lower court that in both cases the plaintiffs impermissibly failed to exhaust the grievance procedures under the collective bargaining agreements. Each agreement contained grievance and arbitration procedures that were intended to constitute the exclusive remedy for a breach of the contract. Federal policy favors the private arbitration of labor disputes. This policy requires that employees suing under § 301 exhaust their administrative remedies. *Mitchell*, 772 F.2d at 345. Thus, we conclude that "federal law obligated plaintiff[s] to exhaust [their] contract remedies before bringing suit under section 301." *Id.* at 347.

VI.

We hold that a district court must, prior to determining whether a state law claim is preempted, initially decide whether it has jurisdiction. We conclude that here all of the plaintiffs' claims arose under the collective bargaining agreements and, therefore, were removable under 28 U.S.C. § 1441. The next step is to determine whether federal law preempts the state claims. Although we note that § 301 does not preempt all state law claims that might involve a provision of a collective bargaining agreement, we hold that all of the plaintiffs' claims are claims for breaches of the just cause provisions of the collective bargaining agreements and thus are preempted. Finally, we note that federal labor law strongly favors the use of the grievance and arbitration mechanisms that are contained in a collective bargaining agreement. In this case, both plaintiffs failed to exhaust the grievance procedures

[21] At oral argument, counsel noted that Lingle's claim has been decided by an arbitrator. Lingle was permitted to pursue her claims under the collective bargaining agreement, because the district court concluded that her claim was really one under § 301, requiring her to exhaust the grievance procedures.

that were meant to be exclusive. Because the plaintiffs have not demonstrated that they should be exempted from this exhaustion requirement, we hold that the disposition of both cases was proper. The judgments of the district court in both *Martin* and *Lingle* are AFFIRMED.

RIPPLE, *Circuit Judge*, with whom, CUDAHY, *Circuit Judge*, joins, dissenting. In *Estin v. Estin*, 334 U.S. 541 (1948), the Supreme Court of the United States, dealing with a delicate question of federalism under the full faith and credit clause, wrote: "[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 545. This court's approach to the federalism question posed by this case evidences a decidedly different approach. Not only does the court ignore the grey areas on the legal landscape, but it even refuses to draw a "black and white" line between federal and state authority. Instead, it opts, as a practical matter, for a single-colored portrait of absolute federal authority. Because such an approach is required neither by the Constitution nor by the congressional mandate of section 301, I respectfully dissent.

A.

The court has no difficulty finding, in the dicta of its recent cases, support for its absolutist approach. *See, e.g., Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986).[1] However, it can find no support for such trivialization of important state interests in the controlling precedent of the Supreme Court of the United States.

[1] In *Graf*, this court stated: "Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies." *Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986).

And, as an intermediate appellate court in the federal system, it is that precedent and not our own predilections which must control.

As the majority acknowledges, the most recent—and most pertinent—precedent is *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In that case, the plaintiff worker was covered by a collective bargaining agreement that contained a provision for disability benefits for non-occupational illnesses and injuries for all employees who were represented by the union. The plaintiff, after suffering a covered injury, had a dispute with Allis-Chalmers with respect to payment of claims. Despite the availability of a grievance arbitration procedure, the plaintiff brought a *tort* action against his employer in Wisconsin state court. He alleged bad faith handling of his insurance claim. *Id.* at 206. The Wisconsin Supreme Court reasoned that the tort of bad faith, while arising out of a contractual relationship, was independent of that contract and thus not a section 301 suit.

The Supreme Court of the United States reversed. The Court began its analysis by noting that, ever since its decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), it has been established that "§ 301 expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.' " 471 U.S. at 209 (quoting *Lincoln Mills*, 353 U.S. at 456). Therefore, "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). The Court in *Allis-Chalmers* further noted that:

> [t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or a suit alleging liability in tort.

471 U.S. at 211. Any other course, suggested the Justices, would create uncertainty as to the contractual rights of the parties and "disputes as to the nature of the agreement would proliferate." *Id.* As noted by the Court:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . . .

Id. at 219-20.

At the same time, however, the Court in *Allis-Chalmers* quite pointedly noted that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Id.* at 211. Indeed, noted the Court:

> [c]learly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id. at 212. The analysis must focus, said the court, on "whether evaluation of the tort claim is *inextricably intertwined with consideration of the terms of the labor contract.* If state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Id.* at 213 (emphasis supplied).

In *Allis-Chalmers*, the Supreme Court concluded that the Wisconsin court's determination that the tort claim was independent of the contract claim meant only that the implied duty to act in good faith was different from the contractual duty to pay. However, noted the Supreme Court, both duties ultimately depend upon the terms of the contract. Both claims "are tightly bound with questions of contract interpretation that must be left to federal law." *Id.* at 216. Since resolution of the state-law claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

The Supreme Court has recently reaffirmed that the holding of *Allis-Chalmers* has "precise limits." In *International Bhd. of Elec. Workers v. Hechler*, 55 U.S.L.W. 4694 (U.S. May 26, 1987), Justice Blackmun, writing for the Court, noted:

> The Court took care in *Allis-Chalmers* to define the precise limits of its holding. The rule there set forth is that, when a state-law claim is substantially dependent on analysis of a collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of section 301 of the LMRA by casting the suit as a state-law claim. 471 U.S., at 220. The Court emphasized, however: "In extending the pre-emptive effect of section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*, at 212.

Id. at 4696 n.3; *see also Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804 (U.S. June 9, 1987).

B.

As noted above, this court—as an intermediate appellate tribunal in the federal system—has a limited role. It must apply the analysis of *Allis-Chalmers* to the cases before it. It must determine "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." 471 U.S. at 213.

When measured against this standard, cases involving retaliatory discharge for filing workers' compensation claims are very different from the situation in *Allis-Chalmers*. The plaintiffs assert no right under the collective bargaining agreement. Rather, they assert that the employer cannot, in violation of state law, retaliate against them for applying for a workers' compensation benefit provided by state law. This right is hardly "inextricably intertwined with consideration of the terms of the labor contract." *Id.* Indeed, it is quite distinct from the rights established by the contract. It is grounded in state law; it does not depend on the rights established by contract; it does not require that reference even be made to the contract. By bringing these actions, the plaintiffs do not circumvent the congressional directive that "federal law govern the meaning given contract terms." *Id.* at 218-19.

Today, the majority simply fails to realize that *Allis-Chalmers* requires a far more focused analysis than the one undertaken by the court. We are not asked in this case to determine whether all state law claims for wrongful discharge are within the preemptive ambit of § 301. In analyzing the preemptive effect of § 301, the general tort of wrongful discharge must be distinguished from the tort of retaliatory discharge for having sought the protection of a state's workers' compensation scheme. In the general wrongful discharge claim, the cause of action may well be premised on activity directly covered by the collective bargaining agreement. *See, e.g., Bale v. General Tel. Co. of Cal.*, 795 F.2d 775, 780 (9th Cir. 1986).

However, in the present retaliatory discharge claim, the cause of action arises from the state's important public policy interest—independent of the collective bargaining agreement—in preserving its workers' compensation system.[2] A state has a strong interest in protecting its employees through its workers' compensation scheme and can, if it chooses, protect those workers from retaliation for seeking assistance from this program. Indeed, it would be "inconsistent with congressional intent," *Allis-Chalmers*, 471 U.S. at 212, to preempt state regulation of this sort which, while furthering an important state interest, is neither "inextricably intertwined with consideration of the terms of the labor contract," *id.* at 213, nor "purports to define the meaning of the contract relationship." *Id.* Indeed, "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Id.* at 212. Nor can the possibility that, on a certain number of instances, the state court may have to determine whether the discharge was based on the filing of a workers' compensation claim or upon other grounds justify wholesale preemption of state law. As Chief Judge Feinberg pointed out in *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102 (2d Cir. 1987):

> [The defendant employer] would have to satisfy the trier of fact in the state court only that it fired [the employee] for a reason unrelated to her filing a workers' compensation claim. Though it would have to show that the reason was more than a pretext, it would not have to establish that the grounds for [the employee's] termination amounted to "just cause" under the collective bargaining agreement.

Id. at 105. In order to prevail against the state claim, the defendant employer need only show that the discharge was for a reason unrelated to the filing of a workers' compensation claim. The legitimacy or illegitimacy of that other reason is not within the cognizance of the court.

In short, the state law-based right asserted here is neither "founded directly on rights created by [a] collective-bargaining agreement[ ] . . . [or] . . . 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar Inc.*, 55 U.S.L.W. at 4806 (quoting *Electrical Workers v. Hechler*, 481 U.S. ____, ____ n.3 (1987)).

C.

The court's failure to undertake a focused inquiry, rigorously tailored to the mandate of *Allis-Chalmers* that preemption is to turn on whether the matter is "inextricably intertwined with consideration of the terms of the labor contract," 471 U.S. at 213, will create many theoretical and practical difficulties if left undisturbed. As the majority quite frankly admits, its broad-brushed preemption analysis causes it to part company with most of the circuits which have addressed this question[3] and with the supreme court of a state within the circuit.[4]

---

[2] Indeed, a claim for retaliatory discharge for having sought the protection of a state's workers' compensation scheme is a prime example of the situation alluded to by the Supreme Court in *Allis-Chalmers* that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

[3] *Compare Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102 (2d Cir. 1987) (no preemption), *Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120, 124 n.2 (3d Cir. 1986) (no preemption) and *Peabody Galion v. Dollar*, 666 F.2d 1309, 1316-19 (10th Cir. 1981) (no preemption, pre-*Allis-Chalmers*) *with Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986) (preemption). As noted by the majority, the Ninth Circuit has not addressed the precise question of whether a cause of action for retaliatory discharge for filing a workers' compensation claim is preempted.

[4] *See Gonzalez v. Prestress Eng'g Corp.*, 503 N.E.2d 308 (Ill. 1986).

On a doctrinal level, the bench and bar of this circuit will indeed find it difficult to determine, in any principled fashion, what limitations, if any, now exist on the preemptive ambit of section 301. All we are told is that, no matter how distinct the state interest may be from the terms of the collective bargaining agreement, no matter how simple a matter it might be for a state court to determine whether the discharge was in retaliation for exercising independently-based state rights, the mere existence of a "just cause" provision in the labor contract—no matter how it has been administered or interpreted—precludes state enforcement of important state governmental interests.

This decision will, of course, also create significant strains in the administration of justice within Illinois. The Supreme Court of Illinois had declared that it is the public policy of Illinois to permit its citizens—those covered by a collective bargaining contract as well as those who are not—to bring a suit for retaliatory discharge when they are fired because they have claimed the protection of a state right to workers' compensation. Now, an intermediate federal appellate court, relying upon no explicit congressional mandate and no direct Supreme Court precedent (indeed some indication to the contrary),[5] has chosen to frustrate that state choice.

[5] As indicated by the Second Circuit in *Baldracchi*, 814 F.2d at 106, a finding of no preemption in this case is supported by the Supreme Court's disposition of *Pan Am. World Airways v. Puchert*, 472 U.S. 1001 (1985). In *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), the Supreme Court of Hawaii held that the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, did not preempt a state statute prohibiting discharge in retaliation for filing a workers' compensation claim. 677 P.2d at 454-56. The United States Supreme Court dismissed the appeal for want of a substantial federal question. As stated by the Second Circuit, "[i]f the Hawaii law were preempted by the RLA, the case would necessarily have presented the Court with a substantial federal question." 814 F.2d at 106.

Conclusion

Careful attention to federalism concerns—constitutionally or statutorily based—rarely permit uncomplicated legal distinctions. However, we have come to accept these "complications" as the price for the orderly diffusion of power. *See Granberry v. Greer*, 107 S. Ct. 1671 (1987) (complications arising from federalism concerns in habeas cases). Today, the court has failed to accept that responsibility and opted for a "quick fix." I respectfully dissent.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—6-23-87—450

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JONNA T. LINGLE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. 85-4426
	)	
NORGE DIVISION OF MAGIC CHEF, INC., a Delaware Corporation.	)	
	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court is defendant's Motion to Dismiss for lack of jurisdiction and plaintiff's response thereto.

This one count complaint for retaliatory discharge was originally brought in State Court. Plaintiff claims that she was terminated from her job by the defendant for exercising her rights under the Illinois Workers' Compensation Act. *Ill.Rev. Stat.* ch. 48, §138 *et. seq.* Defendant argues that plaintiff's claim is governed by a collective bargaining agreement requiring grievance and arbitration of the dispute, and that under the National Labor Relations Act (LMRA), any state law remedies which plaintiff may have are preempted. The Court agrees with the defendant.

In determining the issue of preemption, this Court is guided by the recent United States Supreme Court decision in *Allis-Chalmers Corp. v. Lueck*, ____ U.S. ____, 105 S. Ct. 1904 (1985). In *Allis-Chalmers* the Court was faced

with the issue of whether the tort of handling an insurance claim in bad faith was preempted by §301 of the LMRA[1] where the plaintiff was subject to a collective bargaining agreement providing for certain grievance procedures. In making its determination, the Court set out certain guidelines for courts to follow when faced with similar issues regarding the preemptive effect of §301. One policy which the Court was concerned with effectuating was the need for uniform federal interpretation of contract phrases found in collective bargaining agreements. As stated by the Court, issues relating to "what the parties to a labor contract agreed, and what legal consequences were intended to flow from breaches of that agreement" should be resolved by a uniform body of federal law. 105 S. Ct. at 1911. If the tort claim is "inextricably intertwined with consideration of the terms of the labor contract" or "purports to defined the meaning of the contract relationship" then that tort is preempted. *Id.* at 1912.

The Illinois Supreme Court has recognized a tort for retaliatory discharge despite the existence collective bargaining agreement provisions mandating grievance and arbitration of disputed discharges. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). The Illinois Court did not address the issue of preemption, however, noting that it was not raised in the trial or appellate courts. *Id.* at 1285.

Applying the standards announced by the Court in *Allis-Chalmers*, it is abundantly clear that the plaintiff's

---

[1] Section 301 of the LMRA provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any District Court of the United States having jurisdiction of the parties. 29 U.S.C. §185(a).

claim is preempted. There can be little doubt that plaintiff's claim for retaliatory discharge is "inextricably intertwined" with the collective bargaining provision prohibiting wrongful discharge or discharge without just cause. It is equally clear that such a tort claim would effect the "legal consequences [which] were intended to flow from breaches of [the] agreement." The parties have agreed to abide by the orderly mechanism for grievance of wrongful discharge claims as set out in the collective bargaining agreement. Allowing an independent tort action for retaliatory discharge would undermine the mutually agreed upon procedures provided for in that agreement. *See Midgett,* 473 N.E.2d at 1286-1287 (Ryan, J., dissenting). Recovery of punitive damages is also a posssibility where plaintiff brings an action for retaliatory discharge. Such extraordinary damages clearly are not legal consequences which were intended to flow from the breach of the agreement. Thus, this Court holds that plaintiff's claim for retaliatory discharge is preempted by §301 of the LMRA.[2] *Accord Johnson v. Hussman Corporation,* 610 F. Supp. 757 (E.D. Mo. 1985).

Since plaintiff's claim is essentially a §301 claim, the Court finds dismissal is required due to plaintiff's failure to exhaust his administrative remedies. *Republic Steel Corporation v. Maddox.* 379 U.S. 650 (1965). The grievance/arbitration provisions of the collective bargaining agree-

[2] The Court believes the Seventh Circuit Court of Appeals is in accord on this issue. In *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983) the Court held that the exclusive administrative remedies established by the Railway Labor Act preempted any State Court action for retaliatory discharge. More recently the Court dispelled any notion that Railway Labor Act has a greater preemptive effect than the LMRA where the contract establishes a grievance and arbitration remedy. *Lancaster v. Norfolk and Western Railway Company,* No. 84-2768, slip op. at 12-13 (7th Cir. September 16, 1985).

ment provide the exclusive procedure for resolving disputes between the parties. There is no indication that the union has breached its duty of fair representation in this matter, (*See Republic Steel,* 379 U.S. at 652.) or that plaintiff's claim falls within any other exception to the exhaustion rule. *See D'Amato v. Wisconsin Gas Co.,* 760 F.2d 1474, 1488-89 (7th Cir. 1985).

Accordingly, defendant's Motion to Dismiss is hereby GRANTED. Plaintiff's complaint is hereby DISMISSED.

IT IS SO ORDERED.

DATED: October 9, 1985

/s/ James L. Foreman
CHIEF JUDGE

APPENDIX C

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 23, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

No. 85-2971

JONNA R. LINGLE, Plaintiff-Appellant,
vs.
NORGE DIVISION OF MAGIC CHEF, INC., a Delaware Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 85 C 4426
Judge James L. Foreman

No. 86-1763

PAMELA S. MARTIN, Plaintiff-Appellant,
vs.
CARLING NATIONAL BREWERIES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No. 85 C 3321
Judge James L. Foreman

This cause was reheard en banc on the record from the United States District Court for the Southern District of Illinois, Benton Division, and for the Southern District of Illinois, East St. Louis Division, and was reargued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

OPPOSITION

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE RESPONDENT

P. MICHAEL KIMMEL
GILBERT, KIMMEL, HUFFMAN & PROSSER
102 Orchard Drive
Carbondale, Illinois 62903
(618) 457-3547

EDWARD H. GRAHAM
MAYTAG CORPORATION
403 West 4th Street, North
Newton, Iowa 50208
(515) 791-8893

CHARLES C. JACKSON*
J. STEPHEN POOR
CHRISTOPHER A. WEALS
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

September 14, 1987

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-259

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE RESPONDENT[1]

1. The question presented here is whether an employee covered by a collective bargaining agreement may avoid the preemption principles and policies of private dispute resolution embodied in Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA), and the exclusive and mandatory grievance-arbitration procedures of that agreement, by filing a state-law action based upon "independent" common law claims for retaliatory discharge which purport to regulate the grounds for termination of the employment relationship.

---

[1] Pursuant to Rule 28.1, respondent states that at the time this action was filed Norge Division was an unincorporated operating unit of Magic Chef, Inc., a Delaware corporation. Subsequently, Magic Chef, Inc. merged with and became a wholly-owned subsidiary of Maytag Corporation (formerly The Maytag Company). Maytag Corporation has no parent company. Neither Maytag Corporation nor Magic Chef, Inc. has any non-wholly-owned subsidiaries or affiliates.

It is correct, as the Seventh Circuit acknowledged and the petition for certiorari shows, that the courts of appeals and state courts are in sharp conflict over the question presented. Pet. 8-9; App. 31a-36a. In addition to the *en banc* decision of the Seventh Circuit, the Eighth and Ninth Circuits have held that the policies and purposes of Section 301 prohibit wrongful discharge suits under state law. *Id.* Other courts of appeals, including the Third, Tenth and Second Circuits (see *Baldracchi* v. *Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987), *petition for cert. filed*, No. 87-318, August 24, 1987), have, in respondent's judgment incorrectly, reached the opposite conclusion. Pet. 8-9; App. 31a-36a. In both the federal and state courts,[2] the conflict on the question presented is now undeniably "acute." See *Gonzalez* v. *Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 55 U.S.L.W. 3870 (U.S. June 30, 1987) (White, J., dissenting from denial of writ of certiorari where the Illinois Supreme Court reached a conclusion opposite the Seventh Circuit "on question of whether a state-law claim for retaliatory discharge is preempted by § 301" of the LMRA).

Accordingly, respondent agrees with the court below that this case presents an issue of "extreme importance affecting workers covered by collective bargaining agreements" (App. 2a) as to which this Court should provide a uniform answer and guidance. In respondent's judgment, this can be accomplished by summarily affirming the decision of the court of appeals below and summarily reversing the Second Circuit's decision in *Baldracchi*.[3]

---

[2] Compare *Brevik* v. *Kite Painting, Inc.*, 404 N.W.2d 367 (Minn. Ct. App. 1987) (just cause provisions of collective bargaining agreement would preempt retaliatory discharge claim); *Cox* v. *United Technologies, Essex Group, Inc.*, 727 P.2d 456 (Kan. 1986) (same); *Smith* v. *Montana Power Co.*, 731 P.2d 924 (Mont. 1987) (same) with *MGM Grand Hotel-Reno* v. *Insley*, 728 P.2d 821 (Nev. 1986) (no preemption); *Yoho* v. *Triangle PWL, Inc.*, 336 S.E.2d 204 (W. Va. 1985) (same).

[3] Respondent disagrees with petitioner's contention (Pet. 11) that this Court's summary dismissal for want of a substantial federal question of *Pan American World Airways* v. *Puchert*, 472 U.S. 1001 (1985), affords any basis for questioning the judgment below. That case involved different

(*Footnote continued on next page*)

2. Respondent believes that the result reached in the court of appeals below constitutes a proper resolution of the particular state-law retaliatory discharge claim brought by petitioner. Those decisions reaching a contrary result have employed an improperly wooden interpretation of this Court's recent decisions addressing Section 301 preemption and the viability of purportedly "independent" claims and rights asserted under state law. The controlling principles established by this Court, both in its recent decisions and in earlier decisions, explicate the priority of the labor contract under Section 301. These principles effectuate the congressional purpose of fostering private resolution of industrial disputes. It is to these principles, and their necessary concomitant of federal preemption, that courts should look when deciding whether to permit extra-contractual claims for relief under state-law theories of recovery. While it would be incorrect to suggest that the labor contract and Section 301 subsume *all* "independent" rights and privileges generated by state law, it is equally incorrect to contend, as does petitioner, that state-law rights necessarily survive simply because a particular state legislature or court has seen fit to establish a sphere of state-protected interests. Such an approach would stand on their heads two fundamental congressional policies: encouraging the private ordering of industrial relations and protecting federal uniformity of labor contracts through preemption.

(a) The court of appeals properly applied this Court's holding in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), to find petitioner's claims preempted. "If the policies that animate § 301 are to be given their proper range . . . the preemptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210-11; App. 22a. Thus, whether petitioner was alleging a specific violation of the collective bargaining agreement framed in state-law terms, or was purporting to assert an "independent" state-law claim challenging the termination of her employment, is irrelevant in this case.

(*footnote continued from previous page*)
state and federal statutes, claims and facts and is entitled to little, if any, deference here. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

If the substantive claim directly implicates terms of employment governed by the collective bargaining agreement, it is preempted by Section 301.

In all events, the retaliatory discharge claim raised by petitioner here *does* depend, as the court of appeals recognized, "on an analysis of the terms of the collective bargaining agreement[]." App. 24a. At all times, petitioner was a unionized employee receiving the benefits of a collective bargaining agreement and was subject to the obligations imposed by it. The agreement explicitly prohibited respondent from discharging or suspending petitioner except for "just cause." *Id.* at 2a-3a. It also provided a broad, mandatory grievance-arbitration procedure that was to be the exclusive remedy for all disputes. In fact, petitioner presented the identical claim to an arbitrator, who provided petitioner all the relief sought in petitioner's state-law complaint. Res. App. 1a. Thus, the collectively-bargained grievance procedure favored under our federal system's policy of private dispute resolution was fully and completely responsive to petitioner's claims. Petitioner's purported state-law claim that she was discharged solely in retaliation for exercising her right to file a worker's compensation claim was "inextricably intertwined" with the terms of an agreement made between parties in a labor contract and necessarily governed by Section 301. *Lueck*, 471 U.S. at 213. Cf. *Caterpillar Inc.* v. *Williams*, 107 S. Ct. 2425, 2433 (1987) (expressing no view on whether Section 301 defensive argument of preemption applies to improperly removed suit on "independent" contracts).

(b) The scope and substantive content of Section 301 are necessarily questions of "federal law, which the courts must fashion from the policy of our national labor laws," to the exclusion of "state law." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456, 457 (1957). "It is the policy of the United States . . . to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences . . . by such method as may be provided for in any

applicable [collective bargaining] agreement for the settlement of disputes." LMRA Section 201(b), 29 U.S.C. § 171(b); see also *id.* Section 203(d), 29 U.S.C. § 173(d). The range of disputes subject to the collective bargaining agreement, and the corresponding reach of Section 301 preemption, extends not only to claims derivative of the labor agreement, but to the "whole employment *relationship*." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960) (emphasis added).

Therefore, even if petitioner's claim can be said, in some sense, to be "independent" of the collective bargaining agreement's literal terms, it is not beyond the "whole employment relationship" of respondent and petitioner. Cf. *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1419 (1986) (under Section 301, all disputes even "arguably" within the scope of the grievance-arbitration procedures must be submitted thereunder). And, while it is certainly true that this Court in *Lueck* and other cases has stated that "it would be inconsistent with congressional intent under [Section 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," 471 U.S. at 212, it cannot be true, as petitioner argues (Pet. 10), that a state court or legislature may gerrymander Section 301's substantive content, and avoid its preemptive force, whenever it sees fit to create "independent" laws and rights which purportedly can be litigated without reference to the collective bargaining agreement. Such a limitless rule would have the inevitable effect not only of eviscerating arbitration and the collective bargaining agreement, but of nullifying — on a state-by-state basis — the private system of industrial self-government envisioned by Congress and this Court's decisions.

Under petitioner's approach, there would be nothing to foreclose a state from promulgating rules to govern the most routine of situations now considered "grist in the mills of the arbitrators." *Warrior & Gulf*, 363 U.S. at 584. For example, a state could prescribe the number of employee absences necessary before discharge would be appropriate, the requisite level of insubordination prior to discharge, the

significance of repeated absences or tardiness from work, rules governing overtime pay distribution or any other matter. Because the source of these rights was not the labor contract, but "independent" state law, parallel avenues for relief would exist, denigrating free collective bargaining and causing "arbitration to lose most of its effectiveness." *Lueck*, 471 U.S. at 219-20; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). "Claims involving vacation or overtime pay, work assignments, *unfair discharge* — in short, the whole range of disputes traditionally resolved through arbitration — could be brought in the first instance in state court by a complaint in tort rather than in contract." *Lueck*, 471 U.S. at 219-20 (emphasis added).

The correct approach may be drawn from this Court's decision in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 725 (1985), and other decisions,[4] but not for the reasons petitioner (Pet. 10-11) suggests. *Metropolitan Life*, for example, considered an analogous preemption question under the National Labor Relations Act (NLRA), which utilizes a preemption analysis far less expansive than that utilized in Section 301 cases. See *Pilot Life Insurance Co.* v. *Dedeaux*, 107 S. Ct. 1549, 1557 (1987); *Lueck*, 471 U.S. at 212 n.6; *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). In *Metropolitan Life*, this Court rejected the employer's argument that the NLRA prohibits states from requiring certain mandatory minimum health care benefits to be included in general insurance policies:

> Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees.

[4] E.g., *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (holding that New York pregnancy discrimination law was preempted to the extent purported state regulation encroached in areas of exclusive federal concern under ERISA); *Malone* v. *White Motor Co.*, 435 U.S. 497 (1978) (pre-ERISA state regulation of pension plans, subject to NLRA-imposed bargaining, permissible where Congress intended states could regulate); *Teamsters* v. *Oliver*, 358 U.S. 283 (1959) (Ohio antitrust law preempted by NLRA).

> See, *e.g.*, *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737, 739 (1981). Cf. *Alexander* v. *Gardner-Denver Co.*, U.S. 36, 51 (1974). Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

471 U.S. at 755 (emphasis in original). This language suggests the permissible bounds of federal and state interference with the policy of private dispute resolution envisaged by the LMRA. To the extent federal law intrudes, it is a congressional judgment that the restrictions imposed on the bargaining process are acceptable or even desirable. State intrusions of a similar nature may therefore be no less acceptable or desirable. Currently enacted federal laws, and those federal and state minimum standards laws in force at the time of Section 301's enactment, *id.* at 756, suggest the limits of permissible intrusions into the arena of Section 301 and the power of the parties, by contract, to order their own affairs.

There is no federal or previously-existing state analogy to the retaliatory discharge tort invoked by petitioner. This tort is a comparatively recent development under Illinois law specifically designed to protect employees who, unlike petitioner, are subject to "an employer's otherwise absolute power to terminate an employee at will." *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978). It is precisely this type of claim, if raised by fully-protected employees such as petitioner, that must be preempted to preserve the policies of free collective bargaining, private dispute resolution and arbitration under the LMRA. Such claims cannot be "independent" of the labor contract and must be deemed, as the court of appeals concluded, to be "inextricably intertwined" with, or "substantially dependent" upon, the contract within the meaning of *Lueck*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied and the judgment of the court of appeals summarily affirmed. Should plenary consideration be granted, the Court may wish to allow tandem argument with *Pratt & Whitney* v. *Baldracchi, petition for cert. filed,* No. 87-318, August 24, 1987, which raises substantially identical issues.

Respectfully submitted,

P. MICHAEL KIMMEL
GILBERT, KIMMEL,
HUFFMAN & PROSSER
102 Orchard Drive
Carbondale, Illinois 62903
(618) 457-3547

EDWARD H. GRAHAM
MAYTAG CORPORATION
403 W. 4th Street, North
Newton, Iowa 50208
(515) 791-8893

CHARLES C. JACKSON*
J. STEPHEN POOR
CHRISTOPHER A. WEALS
SEYFARTH, SHAW,
FAIRWEATHER &
GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent Norge Division of Magic Chef, Inc.

September 14, 1987

**Counsel of Record*

APPENDIX

SETTLEMENT AGREEMENT

Grievance #B156
Jonna Ruth Lingle,
Badge #1053

The above referenced grievance was heard in arbitration by Mr. Peter J. Maniscalco on June 23, 1986. The Employer, the Grievant, and the Union, recognize and understand that the arbitrator is the sole judge of the dispute between the parties, and that his decision is final and binding. The parties acknowledge that the arbitrator's decision and award provided, by the way of remedy, that:

"The grievant (Jonna Ruth Lingle) be reinstated with full back pay, all seniority rights and be made full, from the date of discharge to the date of reinstatement. The Company be entitled to take credit for any unemployment compensation or outside earnings the grievant has earned in the interim period."

The parties also acknowledge that, after the parties conferred with the arbitrator on November 7, 1986, the Company is also entitled to take credit for time in which the employee was allegedly disabled, that consisting of the period beginning December 7, 1984 to May 26, 1985.

The parties further acknowledge and agree that, in compliance with the arbitrator's award in this matter, Norge Company has:

1. Returned the employee to an employed status at their plant in Herrin, Illinois;

2. Restored all of the employee's seniority rights and benefits;

3. Paid to the employee all back wages for which she is entitled, to wit: $10,563.37;

4. Otherwise complied with all directives of the arbitrator's decision and award.

Therefore, it is agreed that the above represents a full and complete settlement of the grievance and no further action may be taken by any of the parties relative to this grievance. It is specifically understood that this settlement does not in any way affect any rights Ms. Lingle may have under her existing retaliatory discharge suit filed in the Federal Court under Cause Number 85-2971. Neither does this settlement agreement affect any claims she may have for Workers' Compensation.

Dated this 8th day of Dec., 1986.

FOR THE UNION:

Robert Lindsey
Sherry Taylor
D. William Sawyer
Allen Little
Guy H. Knabb
Raymond Hicks

GRIEVANT:

Jonna R. Lingle Dec 9, 1986

FOR THE COMPANY:

REPLY BRIEF

No. 87-259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 1987

CASELAW PRESS INC. - 1717 K STREET N.W. WASHINGTON DC 20036 - 223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent states at page 4 of its memorandum that an arbitrator has "provided petitioner all the relief sought in petitioner's state law complaint. Res. App. 1a." Lest there be any hint that this case has become moot, we wish to point out that, as indicated in the Petition, at 4 n.1, the outstanding forms of relief which Lingle seeks include reinstatement to her old job, not simply to another job that she was given after the arbitration; back pay at a fully compensatory level, not the special low amount provided by the collective bargaining agreement for those reinstated in arbitration; and punitive damages.

The settlement agreement which appears on page 1a of respondent's appendix provides, in the final paragraph,

that nothing in it shall affect Lingle's rights in her retaliatory discharge action. There would have been no reason to include this qualifying language – indeed, neither side would still be litigating this case – if Lingle had obtained in arbitration all of the relief to which she is entitled under state law. Whether federal law forbids the State of Illinois from providing Lingle with any relief for violations of its public policy, additional to that which is provided for violations of parallel rights under the contract, of course, remains to be decided, and the Court should grant the writ of certiorari to address that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 1987

AMICUS CURIAE

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

October Term, 1987

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
STEVEN M. GUNN
Assistant Attorney General
Counsel of Record
520 Lafayette Road
St. Paul, Minnesota 55155
(612) 296-7960
Attorneys for State of Minnesota

SCOTT R. STRAND
Assistant Attorney General
Of Counsel

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-259

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE

Amicus State of Minnesota submits this brief in support of Jonna R. Lingle's petition for a writ of certiorari in this case.

INTEREST OF AMICUS CURIAE

The State of Minnesota is one of many states that prohibit employers from discharging or otherwise discriminating against their employees, union or nonunion, for filing workers' compensation claims.[1] Minnesota is also one of many states that permit employees to sue their employers in tort or in contract if their discharges violate public policy.[2] Like all states, Minnesota has adopted a number of other laws that regulate the terms and conditions of employment.

The decision of the Seventh Circuit in this case threatens the continued viability of those state regulations, at least as applied to union employees. According to the court below, any state law that provides employees with remedies for retaliatory discharge is preempted by federal labor law to the extent that it applies to employees covered by collective bargaining agreements. Under the Seventh Circuit's holding, nonunion employees have the right to sue for violations of state labor laws; union employees have only the protections and remedies afforded by their collective bargaining agreements.

Consequently, the states, all of whom wish to retain their traditional police power to substantively regulate working conditions, whether in unionized settings or not, have a compelling interest in seeing that this Court overturns the decision of the Seventh Circuit. If that decision is allowed to stand, unions and employers will be permitted to exempt themselves from minimum state labor standards, including minimum protections against retaliatory discharges, simply by the process of collective bargaining.

---

[1] Minn. Stat. § 176.82 (1986). See attached addendum for other state workers' compensation retaliatory discharge laws.

[2] 1987 Minn. Laws ch. 76, to be codified at Minn. Stat. §§ 181.931-.935. Other states have judicially recognized this principle. See attached addendum.

ARGUMENT

The petition for a writ of certiorari should be granted in this case for these reasons:

(1) By holding that state retaliatory discharge claims are preempted by federal labor law and are properly removed to federal court, the decision below raises important questions concerning the role of state legislatures and state courts in our federal system;

(2) The decision below runs contrary to a number of previous decisions of this Court, recognizing the independence of substantive statutory rights from rights created by collective bargaining agreements; and

(3) There is a clear conflict among the circuits, and among the state and federal courts that have considered this issue.

I. THE PREEMPTION AND REMOVAL DECISIONS OF THE COURT BELOW RAISE IMPORTANT QUESTIONS CONCERNING THE ROLE OF STATE LEGISLATURES AND STATE COURTS IN OUR FEDERAL SYSTEM.

As this Court has repeatedly recognized, "[p]reemption of state law by federal statute or regulation is not found in the absence of pervasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *see also California Federal Savings & Loan Ass'n v. Guerra*, 107 S.Ct. 683, 689 (1987) ("pre-emption is not to be lightly presumed"). Indeed, this Court has often specifically recognized states' legitimate and compelling interest in substantively regulating the terms

and conditions of employment. As this Court stated just last Term in upholding a state severance pay program against a preemption challenge, "preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State[s]." *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211, 2222 (1987); *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985).

The decision below takes away the right of the states to set minimum labor standards, at least as far as unionized employees are concerned. Whether it be state laws protecting workers from discrimination for filing workers' compensation claims as in this case, or state laws forbidding discrimination against employees for filing job safety and health complaints, for challenging unlawful pay practices, or for exercising other statutory and common-law rights, the holding of the court below is that those state laws may be constitutionally enforced only on behalf of nonunion employees. Union employees are left with only their rights and remedies under their collective bargaining agreements. The decision below takes away the power of states to set minimum labor standards that apply to union and nonunion employees alike.

The Seventh Circuit's holding also takes away the authority of the state courts to make the appropriate decisions in these cases. By allowing the employer to remove the employee's state-law retaliatory discharge claim to federal court, without any federal claims appearing on the face of the employee's complaint, the decision below eviscerates the well-pleaded complaint rule. The lower court's holding fails to give proper weight to the long-established principles "that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the

cause heard in state court." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2433 (1987).

By broadly preempting most substantive state regulation of the unionized workplace, and by extending the removal jurisdiction of the federal courts to most, if not all, state-law claims made by unionized employees, the court below has done serious violence to the principles of federalism. That alone justifies review by this Court.

II. THE DECISION BELOW RUNS CONTRARY TO A NUMBER OF PREVIOUS DECISIONS OF THIS COURT, RECOGNIZING THE INDEPENDENCE OF SUBSTANTIVE STATUTORY EMPLOYEE RIGHTS FROM RIGHTS CREATED BY COLLECTIVE BARGAINING AGREEMENTS.

Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, gives the federal courts subject-matter jurisdiction over suits for violations of collective bargaining agreements and it requires that the courts apply federal common law to determine the meaning of these agreements. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). As a general rule, that federal common law requires that claims under a collective bargaining agreement be submitted to the grievance-arbitration process and not be decided by the courts. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). On that basis, the court below held that the employees in this case should be compelled to submit their wrongful discharge claims to arbitration and should not be permitted to seek relief in court.

That holding and the "exclusive remedy for a single injury" theory espoused by the court below are contrary to the decisions of this Court. This Court has not hesitated to back away from its endorsement of arbitration whenever employees seek

to enforce statutes guaranteeing them substantive rights. In those situations, this Court has invariably held that employees have a right to bring their claims in court, and do not have to resort to the grievance arbitration process. *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 107 S.Ct. 1410 (1987) (Federal Employers' Liability Act); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963) (Colorado anti-discrimination law). In every one of those cases, this Court recognized the independence of the employee's substantive statutory rights from any collective bargaining agreement commitments and emphasized the importance of maintaining access to the judicial forum.

That same recognition of the independence of contract and public-law rights extends to state regulation of the workplace. In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the case relied upon by the majority below, this Court took pains to point out that section 301 does not preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* at 212. Again, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court rejected the notion that, under federal labor law, state workplace regulations could not be enforced in the unionized setting. As this Court pointed out:

> It would further few of the purposes of the [National Labor Relations] Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers v. Lueck*, 471 U.S. at 217. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employers.

Id. at 756. The Court reached the same conclusion in *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211 (1987), when it upheld Maine's plant closing/severance pay statute. Again, this Court rejected the argument that collective bargaining agreements displace state minimum labor standards; it instead characterized those state standards as an independent "backdrop" for collective negotiations.

This Court reaffirmed that principle in *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987), when it held that section 301 did not preempt state-law individual employment contract claims. As this Court held:

> Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement.

Id. at 2431-32 (emphasis in original, citation omitted). Justice Brennan's opinion for a unanimous Court then went on to clarify that:

> Section 301 does not, as Caterpillar suggests, require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and

> thus be governed by a federal common-law created by § 301. . . . Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by § 301.

Id. at 2432 n.10. As this Court decided less than two months after *Allis-Chalmers*, the nonpreempted claims described by Justice Brennan include state workers' compensation retaliatory discharge claims. *Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985), *dismissing appeal from Puchert v. Agsalud*, 67 Haw. 22, 677 P.2d 449 (1984) (appeal from Hawaii Supreme Court decision finding no preemption of workers' compensation retaliatory discharge claim dismissed for want of a substantial federal question).

The majority below simply ignored these cases, and instead adopted an expansive interpretation of *Allis-Chalmers* that even the language of that opinion cannot support. Consequently, this Court should correct the error made by the Seventh Circuit and reaffirm its previous holdings.

III. THERE IS A CLEAR CONFLICT AMONG THE FEDERAL AND STATE COURTS THAT HAVE CONSIDERED THIS ISSUE.

Another reason for granting the petition for a writ of certiorari is the conflict among the circuits, and among the federal and state courts that have decided this question. The Eighth Circuit agrees with the Seventh that section 301 preempts state retaliatory discharge claims. *Johnson v. Hussman Corp.*, 805 F.2d 795 (8th Cir. 1986). The Second, Third, and Tenth Circuits disagree, *Baldracchi v. Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2d Cir. 1987); *Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120 (3d Cir. 1986); *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981), while the Ninth Circuit position is unclear. *Compare Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) *with Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) *and DeSoto v. Yellow Freight Systems, Inc.*, 820 F.2d 1434 (9th Cir. 1987), *rehearing denied*, Nos. 85-6608 and 86-5800 (July 20, 1987). A number of state supreme courts have found no preemption, *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 104 Ill. Dec. 751, 503 N.E.2d 308 (1986), *cert. denied*, 107 S.Ct. 3248 (1987); *Puchert v. Agsalud*, 67 Haw. 22, 677 P.2d 449 (1984), *appeal dismissed sub. nom. Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985); *MGM Grand Hotel—Reno v. Insley*, 728 P.2d 821 (Nev. 1986), and the Minnesota Supreme Court is about to decide basically the same question in *Brevik v. Kite Painting, Inc.*, 404 N.W.2d 367 (Minn. Ct. App. 1987), *review granted* (June 26, 1987). This issue has been thoroughly briefed and analyzed, and there is no need for further development of the law in the lower courts. The question is ready for this Court to decide.

CONCLUSION

For the above-stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
STEVEN M. GUNN
Assistant Attorney General
Counsel of Record
Suite 200, 520 Lafayette Road
St. Paul, Minnesota 55155
Telephone: (612) 296-7960
Attorneys for Amicus Curiae
State of Minnesota

Of Counsel:
SCOTT R. STRAND
Assistant Attorney General

ADDENDUM

At least twenty-two states have, by statute or constitution, prohibited employers from retaliating against their employees for filing workers' compensation claims:

Arizona—Ariz. Const. art. 18, § 3;,
California—Cal. Lab. Code § 1320a (West Supp. 1987);
Connecticut—Conn. Gen. Stat. § 31-290a (1987);
Florida—Fla. Stat. § 440.205 (1985);
Hawaii—Haw. Rev. Stat. § 378-32(2) (1985);
Louisiana—La. Rev. Stat. Ann. § 23:1361 (West 1983);
Maine—Me. Rev. Stat. Ann. Tit. 39, § 111 (West Supp. 1985);
Maryland—Md. Code Ann. art. 101, § 39A(a) (Michie 1985);
Massachusetts—Mass. Gen. Laws Ann. ch. 152, § 75B(2) (Law Co-op. Supp. 1987);
Minnesota—Minn. Stat. § 176.82 (1986);
Missouri—Mo. Rev. Stat. § 287.780 (1986);
New Jersey—N.J. Stat. Ann. § 34.15 - 39.1 (West Supp. 1987);
New York—N.Y. Work. Comp. Law § 120 (McKinney Supp. 1987);
North Carolina—N.C. Gen. Stat. § 97-6.1 (Michie 1985);
Ohio—Ohio Rev. Code Ann. § 4123.90 (Anderson 1980);
Oklahoma—Okla. Stat. Ann. tit. 85, § 5 (West Supp. 1987);
Oregon—Or. Rev. Stat. § 659.410 (1985);
South Carolina—S.C. Code Ann. § ———— (Law. Co-op 1987) (to be codified);
Texas—Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon 1987);
Virginia—Va. Code Ann. § 65.1-40.1 (1987);
West Virginia—W.Va. Code § 23-5A-1 (Michie 1985);
Wisconsin—Wis. Stat. § 102.35(2) (1985-86).

At least eight other states have judicially recognized the tort of retaliatory discharge for filing workers' compensation claims:

Illinois—Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978);

Indiana—Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973);

Kansas—Murphy v. City of Topeka-Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981);

Kentucky—Firestone Textile Co. Div. v. Meadows, 666 S.W. 2d 730 (Ky. 1983);

Michigan—Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976);

Nevada—Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984);

Tennessee—Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

Courts in the following states have allowed employees to bring retaliatory discharge claims based on "public policy" tort or contract theories.

Alaska—Knight v. American Guard-Alert, Inc., 714 P.2d 788 (Alaska 1986);

Arizona—Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ariz. App. 1977);

Arkansas—Schottes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1982); Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984);

California—Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980);

Connecticut—Sheets v. Tedding's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1986);

D.C.—Newman v. Legal Services Corp., 628 F.Supp. 535 (D.D.C. 1986);

Hawaii—Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982);

Idaho—Jackson v. Minidoka Irrig. Dist., 98 Idaho 330, 563 P.2d 54 (1977);

Illinois—Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981);

Indiana—Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973);

Kansas—Murphy v. Topeka-Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981);

Kentucky—Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983);

Louisiana—Gil v. Metal Service Corp., 412 So.2d 706 (La. App. 4th Cir.), *cert. denied*, 414 So.2d 379 (1982);

Maryland—Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981);

Massachusetts—Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982);

Michigan—Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976);

Minnesota—Phipps v. Clark Oil Co., 408 N.W.2d 569 (Minn. 1987);

Missouri—Henderson v. St. Louis Housing Authority, 605 S.W.2d 800 (Mo. App. 1979);

Montana—Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980);

Nevada—Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984);

New Hampshire—Cloutier v. Great Atlantic & Pacific Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981);

New Jersey—Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980);

New Mexico—Zuriga v. Sears, Roebuck & Co., 100 N.M. 414, 671 P.2d 662 (N.M. App. 1983);

North Carolina—Sides v. Duke Hospital, 74 N.C. App. 331, 308 S.E.2d 818 (1985);

Ohio—Lovorn v. Dayco Corp., 101 Lab. Gas (CCH) ¶55482 (Ohio CP 1984);

Oregon—Holmen v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984);

Pennsylvania—Geary v. U.S. Steel Co., 456 Pa. 171, 319 A.2d 174 (1974);

South Carolina—Ludwick v. This Minute of Carolina, Inc., 287 S.C. 284, 278 S.E.2d 607 (1981);

Tennessee—Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984);

Texas—Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985);

Virginia—Bowman v. State Bank of Keysville, 229 Va. 343, 297 S.E.2d 797 (1985);

Washington—Thompson v. St. Regis Paper Co., 102 Wash. 219, 685 P.2d 1081 (1984);

West Virginia—Harless v. First National Bank, 169 W.Va. 673, 289 S.E.2d 692 (1982);

Wisconsin—Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

JOINT

APPENDIX

No. 87-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONNA LINGLE,
Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.
Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

CHARLES C. JACKSON
(Counsel of Record)
J. STEPHEN POOR
CHRISTOPHER A. WEALS

Seyfarth, Shaw,
Fairweather, and
Geraldson
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

December 11, 1987

CASILLAS PRESS • INC. 1717 K STREET, N.W., SUITE 10, WASHINGTON, D.C. • 223-1220

TABLE OF CONTENTS

LIST OF DOCKET ENTRIES

8/21/85	1	PETITION/REMOVAL obo Deft. w/following pldgs. attached.
8/21/85	4	COPY of complaint fld in Williamson Cty w/Jury Demand.
9/16/85	7	MOTION TO DISMISS obo deft or in alternative stay action pndg arbitration w/agreement book (in separate envelope in file) & memo in supp.
9/20/85	8	RESPONSE obo pltf to mtn to dism or stay act pndg arbitration.
9/20/85	9	MEMORANDUM obo pltf in supp of resp to mtn to dism/stay act pndg arb. (Subm JLF)
9/09/85	10	ORDER (JLF) that deft's mtn to dism is GRANTED; pltf's cmplt is hereby DISMISSED. EOD 10/09/85. Cps dist.
11/07/85	11	NOTICE obo pltf of appeal. (pd $70.00 red. #12786)

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

JONNA R. LINGLE, PLAINTIFF,	)	
VS.	)	NO: 85-L-118
NORGE DIVISION OF MAGIC CHEF, INC., a Delaware Corporation	)	
DEFENDANT.	)	

COMPLAINT AT LAW

The Plaintiff, Jonna R. Lingle (hereinafter 'LINGLE'), by and through her attorneys, Freddy L. Shapiro, Ltd., for cause of action against the Defendant, Norge Division of Magic Chef Inc., a Delaware Corporation, (hereinafter 'NORGE'), states as follows:

COUNT I

(RETALIATORY DISCHARGE)

1. NORGE is a corporation organized under the laws of the State of Delaware, licensed to do business in the State of Illinois on April 20, 1964 and engaged in the manufacture of household appliances.

2. Between August 16, 1978 and December 11, 1984 LINGLE was employed by NORGE at NORGE's manufacturing facility at Lyerla Dr. Herrin, Williamson County, Illinois.

3. On December 5, 1984 LINGLE, pursuant to Illinois Workers Compensation Act, Ill. Rev. Stat. Chap. 48, Section 138.6, gave notice to NORGE at her place of employment

that she had sustained injuries while employed at NORGE's manufacturing facility in Herrin, Illinois.

4. Also on December 10, 1984 LINGLE communicated to her superiors at NORGE that, pursuant to the Illinois Workers Compensation Act, Ill. Rev. Stat. Chapter 48, Section 138.6, she would seek to have NORGE pay medical bills incurred in the course of treatment of her injuries received in the course of her employment by NORGE.

5. On December 11, 1984, NORGE through its Director of Human Resources, Bob Fuller, discharged LINGLE from her employment with NORGE solely because of LINGLE's exercise of her rights and remedies under the Illinois Workers Compensation Act, Ill. Rev. Stat. Chap. 48, Section 138 et seq.

6. Discharge of an employee solely because of an employee's exercise of rights and remedies under the Illinois Workers Compensation Statute, Rev. Stat. Chap. 48, Section 138 et seq. is contrary to public policy of the State of Illinois and illegal.

7. As a direct result of NORGE's discharge of LINGLE, LINGLE has incurred substantial and continuing financial losses in the form of lost income.

WHEREFORE, LINGLE prays for a judgment against NORGE of money damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and demands a trial by a jury of twelve.

JONNA R. LINGLE
BY HER ATTORNEYS:
FREDDY L. SHAPIRO
LTD

BY:
ROBERT L. MILLER
ATTORNEY AT LAW
P.O. BOX 250
MURPHYSBORO, IL 62966

AFFIDAVIT

STATE OF ILLINOIS)
COUNTY OF JACKSON) ss.

The affiant, Jon O. Nicholas, being first duly sworn on oath, states as follows:

1. That the affiant is under no legal disabilities and over the age of 21 years.

2. That the affiant is an employee of Magic Chef, Inc. and is the Director of Human Resources for the Norge Division of Magic Chef, Inc.

3. That the affiant has been employed at the Norge Division continuously since prior to August, 1978, and is fully acquainted with the labor/management agreements entered into on behalf of Norge with the International Association of Machinists and Aerospace Workers, Lodge No. 554, District No. 111.

4. That at all times from August, 1978 through the present, all assembly line workers have been covered by successive collective bargaining agreements between the IAMAW and Norge and its owners.

5. That plaintiff, Jonna R. Lingle, was an employee of Norge Division of Magic Chef, Inc., and at all times during employment was covered by the various collective bargaining agreements entered into on behalf of workers of Norge.

6. That on December 11, 1984, a collective bargaining agreement existed between Norge Division of Magic Chef, Inc., and the IAMAW, said agreement being dated the 28th day of May, 1984, a copy of which is attached to this Affidavit.

7. That grievances and arbitration are covered in the said agreement under Articles 7 and 8, and the decision made in conformance with the arbitration procedure is binding on both the company and the employees.

8. That Article 26 of the said agreement covered discharge and discipline and allows for binding arbitration through the grievance procedure of discharges.

9. That there is currently pending a grievance procedure designated as B-156 filed on behalf of Jonna R. Lingle on December 11, 1984, which said grievance procedure has gone through the entire grievance procedure, and is now pending for binding arbitration.

10. That as of this time, an arbitrator has been selected but the arbitration hearing has not been held.

11. That a copy of the grievance blank attached to this affidavit signed by Jonna R. Lingle is a true and accurate copy of the grievance filed in this matter concerning the discharge of said Jonna R. Lingle.

12. Further affiant sayeth not.

/s/
Jon O. Nicholas

Subscribed and sworn to before me this 10 day of September, 1985.

Herrin Lodge 554

No. 156

International Association of Machinists

GRIEVANCE BLANK

Employee Grievance Jonna Lingle Dept. 6

Time 1700 Date 12/11/84

Nature of Grievance: Discharged - Violation of Company Policy (Group III-7) On 12/11/84 Joanna Lingle was called by Bob Fuller, who informed her she was discharged as of this date. Reason for discharge was she is being accused of falsifying a plant injury. This injury was properly reported to the company, and is presently under doctors treatment. Full doctors diagnosis has not been completed at the present time.

The Union feels that she is not guilty of making a false claim, due to complying with company policy by making the report and still under the treatment by the doctor.

Therefore the Union request she be re-instated back to work with full seniority rights and be paid for all lost pay as the result of being discharged as per article 26.

Committeeman Henry Curl
Employee
Jonna R. Lingle

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

This Agreement is made and entered into this 28th day of May, 1984, by and between Norge Division of Magic Chef, Inc., Lyerla Drive, Herrin, Illinois, (hereinafter referred to as the 'Employer'), and Lodge 554, of the International Association of Machinists and Aerospace Workers (hereinafter referred to as the 'Union').

This Agreement between the Parties which became effective May 28, 1984, will remain in full force and effect until the end of the 7th day of June, 1987.

Article I
PURPOSE

1.1 It is the intent and purpose of the Parties to this Agreement to set forth herein the basic conditions of employment as agreed to by the Employer and the Union; to establish a harmonious relationship between the employer and its employees who are subject hereto; to promote and improve that relationship and the industrial and economic conditions of both; to specify the relative rights and privileges of the Parties together with operating and working conditions; and to establish prompt and equitable means for the settlement of grievances which may arise under the terms of this Agreement.

Article 2
RECOGNITION

2.1 The Employer recognizes the Union as the sole and exclusive bargaining agency with respect to wages, hours and other conditions of employment for all productive and non productive employees who are employed at Norge Division

of Magic Chef, Inc., Lyerla Drive, Herrin, Illinois, and any subsequent plant or plants established within a twenty-five (25) mile radius of Herrin, Illinois but EXCLUDING confidential employees; executives; office employees; clerical employees; factory and service clerks; employees of the engineering and time study departments; timekeepers and checkers; first aid or medical employees; technicians, security guards; supervisors who have the authority to hire, promote, discharge, discipline, or effectively recommend such action; assistant supervisors; and all supervisors as defined in the Labor Management Relations Act of 1947, as amended, as well as any other employees who are at any time excluded by law or a decision of an authorized governmental agency, provided, that any individual employee or group of employees shall have the right at any time to present grievances to the Employer and to have such grievances adjusted in conformity with the provisions of the Labor-Management Relations Act of 1947, as amended, provided further, that the procedure in presenting such grievances will not be inconsistent with the recognized practice of handling grievances as defined in this Agreement.

Article 3
UNION SHOP

3.1 Any employee who is a member of the Union in good standing on the effective date of this Agreement shall maintain membership in the Union as a condition of employment to the extent of paying membership dues uniformly levied against all Union members. Such employee may have membership dues deducted from the employee's earnings by signing an Authorization for Check-off of Dues, or, if no such Authorization is in effect, the employee must pay membership dues directly to the Union. Initiation, or reinstatement fees must be paid directly to the Union.

Article 7
GRIEVANCE PROCEDURE

7.1 For the purpose of this Agreement, the term 'grievance' will mean any dispute between the Employer and the Union, or between the Employer and any employee, concerning the effect, interpretation, application, claim of breach or violation of this Agreement. The Employer will not be required to consider or adjust any grievance during the term of this Agreement unless the employee(s) remain at work pending the adjustment of the grievance in accordance with the provisions of this Agreement.

7.2 A grievance shall be settled in accordance with the following **[four-step]** procedure: **[omitted]**

7.4 Grievances shall be reduced to writing by the Union or the employee involved and shall contain a statement setting forth the nature of the grievance and the violation claimed. Copies of such written grievances will then be processed in the following manner:**[omitted]**

7.7 Upon settlement of any written grievance, the Parties hereto, through their designated Representatives, will sign the settlement. The authorized Representatives of the Union and the Employer must sign all settled grievances before the settlement becomes final and binding unless such grievance is settled as defined in 7.5 hereof. In the event of a monetary settlement, the Employer will make payment no later than the second regular payday following settlement.

Article 8
ARBITRATION

8.1 In the event the Union or the Employer submits a grievance to Arbitration, the Arbitrator shall be selected according to, and shall be governed by the following procedure:

The Federal Mediation and Conciliation Service shall be requested to submit the names of seven (7) qualified Arbitrators from which the Union and the Employer shall alternately strike a name until one (1) name is left, the remaining one to be the Arbitrator. The Parties shall meet within one (1) week after the list is received, to select an Arbitrator. The Parties shall draw lots for the first deletion. If either Party refuses to select an Arbitrator from the seven (7) Arbitrator list, an additional list shall be ordered.

8.2 The Arbitrator shall have the authority to settle any disagreements concerning the interpretations or applications of the terms of this Agreement, but shall have no authority to add to, subtract from, or modify any of the terms of this Agreement, or to establish any conditions not contained in this Agreement.

8.4 Any decision made in conformance with this Arbitration Procedure shall be accepted by both the Employer and Union, shall be final and binding on both Parties, and shall be complied with within five (5) working days after the decision is rendered. It is the intent of the Parties to this Agreement that the Grievance Procedure hereinbefore outlined shall serve as means for peaceful settlement of all disputes that may arise between them.

8.5 The Grievance Procedure and Arbitration provided for herein shall constitute the sole and exclusive method of determination, decision, adjustment, or settlement between the Parties of any and all grievances as defined herein, and the Grievance Procedure and Arbitration provided herein shall constitute the sole and exclusive remedy to be utilized by the Parties hereto for such determination, decision, adjustment, or settlement of any and all grievances as herein defined.

Article 18
INCENTIVE WAGE PLAN

18.15 The applicable downtime rate will be paid to an employee for downtime not caused by the fault of the employee in excess of ten (10) minutes, during any shift, provided that the employee affected records the time the operation ceased and notifies the Supervisor or other Employer designated representative that such lost time has occurred, provided, further that the employee is required to remain at the regular work station, or accept work the Employer may designate. This provision applies to lost time necessitated by waiting for an assignment, waiting for material, machine breakdown, waiting for set up, and, except as otherwise provided in this Agreement, attending meetings when called by the Employer. Downtime rates for all incentive employees not covered in Section 18.19, regardless of classification, are as follows:

Effective 5/28/84--$ 5.00 plus Cost-of-Living.
Effective 6/03/85--$ 5.25 plus Cost-of-Living.
Effective 6/02/86--$ 5.50 plus Cost-of-Living.

18.20 All employees assigned to incentive classifications are guaranteed to receive earnings of at least fifty percent (50%) above base rate, plus cost-of-living, for any day of incentive work, as long as incentive effort is applied by the employee.

Article 20
LAY-OFF AND RECALL

20.1 Seniority shall entitle an employee to preference over other employees in the same department with less seniority in case of lay-off and in recall after lay-off, provided the employee is qualified to do the work required. New employees will not be hired until employees are recalled who were laid

off and who have seniority in the plant and are qualified to do the required work. An employee shall be obligated to accept available work for which qualified when it is offered in accordance with seniority.

Article 24
STRIKE AND LOOKOUT

24.1 During the term of this Agreement the Union or any of its agents or members shall not cause or take part in any strike, sympathy strike, or other interruption or any impeding of production at the plant of the Employer covered by this Agreement except in case the Employer:

a. Fails to abide by the Arbitration Procedure of this Agreement; or

b. Fails to comply with any decision rendered under the Arbitration Provision of this Agreement.

24.2 Any employee(s) participating in any unauthorized strike, or work stoppage, or slowdown, shall be subject to discharge, or other disciplinary action. Such action is subject to the provisions of the Grievance Procedure.

24.3 The Employer shall not engage in any lockout of its employees during the term of this Agreement.

Article 25
FUNCTIONS OF MANAGEMENT

25.1 It is agreed that the Management of the Employer has the sole and exclusive rights, duties, and responsibilities to direct the operations of the Employer and its working forces subject only to applicable requirements of this Agreement. Such functions of Management include but are not limited to the exclusive rights to determine the products, schedules

of production, methods and processes, place of manufacture, and acquisition of all materials and parts; to hire, suspend, or discharge for proper cause, or relieve employees from duty because of lack of work or other legitimate reasons; to introduce new or improved production methods or facilities; and to determine the method of employee compensation when any operation or processes are brought into the plant or transferred to other departments or divisions, subject to the provisions of this Agreement.

Article 26
DISCHARGE AND DISCIPLINE

26.1 Willful disregard of or refusal to comply with the Employer's rules or proper orders and instructions from duly authorized supervisory executives within the terms, spirit, and intent of this Agreement will be cause for discipline by the Employer, subject to the Grievance Procedure. All employees will be furnished with a copy of the Employer's rules and regulations. Rules and Regulations will be posted on Employer Bulletin Boards.

26.2 The right of the Employer to discharge or suspend an employee for just cause is recognized. Any seniority employee being discharged or suspended, will be entitled to Union representation prior to final action. The Employer will arrange for a Shop Committee member, who is available in the plant at such time, to be present with such employee prior to the taking of final action by the Employer provided the employee either is at work, or has reported for work, or has arrived on the Employer's premises in response to instructions to do so. In case of any discharge, or suspension, the Human Resources Department must be notified by the employee discharged or suspended, or by the employee's representative, of any claim of alleged wrongful discharge or

suspension, within two (2) working days after such discharge or suspension.

Upon receipt of such notification, the case shall be taken up promptly at the Third Step of the Grievance Procedure. If it is found that the employee was wrongfully discharged or suspended, the Employer agrees to reinstate such employee with former seniority rights. Non-incentive employees will be paid their regular Hourly Day Rate and incentive employees will be paid their applicable downtime rate for time lost from work due to such discharge or suspension.

Article 35
TERMS OF AGREEMENT

35.1 a. This Agreement supersedes all previous Agreements or understandings between the Employer and its employees and/or their representatives. Any previous arrangements not embodied herein are declared to be fully terminated hereby.

b. This Agreement expresses the complete and entire understanding of the Parties on the subjects of wages, hours, and other terms and conditions of employment, and neither the Union nor the Employer shall be required to negotiate further on the subject of wages, hours, and other conditions of employment contained in this Agreement. This shall not be construed to limit bargaining during the sixty (60) day period prior to the termination of this Agreement.

APPENDIX 'D'

SCHEDULE OF JOB CLASSIFICATIONS AND HOURLY DAY RATES INCENTIVE CLASSIFICATIONS (EFFECTIVE 6/3/85)

CLASSIFICATION	Maximum Hourly Day Rate*
205-Assembler	$ 4.28
** 206-Finder Assembler Set-Up and Operate	4.61
207-Automatic Screw Machine Set-Up and Operate	4.43
220-Centerless Grinder-Set-Up and Operate	4.33
222-Chain or Conveyor Loader	4.28
224-Control Operator Porcelain	4.33
234-Machine Operator	4.28
240-Furnace Loader & Unloader-Porcelain	4.33
255-Index Drilling Machine Operator	4.33
275-Paint Systems Operator-Electrostatic	4.43
276-Pickle Operator	4.33
279-Press & Brake Operator	4.28
280-Automatic Press-Set Up & Operate	4.38
283-Repair-Assembly	4.33
** 284-Repair-Final Assembly	4.66
286-Salt Bath Heat Treat Operator	4.33
288-Sander	4.28
290-Shear and Slitter Operator	4.28
291-Hand Sprayer - Paint & Porcelain	4.38
297-Tack Rag	4.28

309-Vibratory Deburr Operator	4.28
318-Spot Welder	4.28
320-Automatic Shear-Set-Up & Operate	4.38
321-Automatic Shear-Operate Only	4.28
322-Wire Stripping & Terminating Machine Operator	4.33
323-Silk Screen-Set-Up and Operate	4.28

Utility Worker — Any employee assigned to the duties of Utility Worker will be paid 10¢ per hour above the employee's regular hourly day rate while performing such assigned duties.

Inventory — Incentive employees required to work on inventory will be paid their Hourly Day Rate plus 50%.

*New hires will be started at a rate of fifty-five cents (55¢) per hour below these rates for the first year of employment and will receive 13¢ after 3 months, 14¢ 3 months later, 14¢ 3 months later and the final 14¢ after twelve (12) months of service.

**Classifications 206 and 284 consist only of employees in groups 15A-Washer Final Assembly, 17A-Dryer Final Assembly, and 10T-Transmission Assembly.

APPENDIX "D"
SCHEDULE OF JOB CLASSIFICATIONS AND HOURLY DAY RATES INCENTIVE CLASSIFICATIONS
(EFFECTIVE 6/2/86)

	CLASSIFICATION	Maximum Hourly Day Rate*
	205-Assembler	$ 4.44
**	206-Final Assembler	4.47
	207-Automatic Screw Machine Set-Up and Operate	4.59
	220-Centerless Grinder-Set-Up and Operate	4.49
	222-Chain or Conveyor Loader	4.44
	224-Control Operator Porcelain	4.49
	234-Machine Operator	4.44
	240-Furnace Loader and Unloader-Porcelain	4.49
	255-Index Drilling Machine Operator	4.49
	275-Paint Systems Operator-Electrostatic	4.59
	276-Pickle Operator	4.49
	279-Press & Brake Operator	4.44
	280-Automatic Press-Set Up & Operate	4.54
	283-Repair-Assembly	4.49
**	284-Repair-Final Assembler	4.82
	286-Salt Bath Heat Treat Operator	4.49
	288-Sander	4.44
	290-Shear and Slitter Operator	4.44
	291-Hand Sprayer - Paint & Porcelain	4.54
	297-Tack Rag	4.44
	309-Vibratory Deburr Operator	4.44
	318-Spot Welder	4.44

	320-Automatic Shear-Set Up and Operate	4.54
	321-Automatic Shear-Operate Only	4.44
	322-Wire Stripping & Terminating Machine Operator	4.49
	323-Silk Screen-Set-Up and Operate	4.44

Utility Worker - Any employee assigned to the duties of Utility Worker will be paid .10 per hour above the employee's regular hourly day rate while performing such assigned duties.

Inventory - Incentive employees required to work on inventory will be paid their Hourly Day Rate plus 50%.

*New hires will be started at a rate of fifty-five (55¢) per hour below these rates for the first year of employment and will receive 13¢ after 3 months, 14¢ 3 months later, 14¢ 3 months later and the final 14¢ after twelve (12) months of service.

**Classifications 206 and 284 consist only of employees in groups 15A-Washer Final Assembly, 17A-Dryer Final Assembly, and 10T-Transmission Assembly.

NORGE EMPLOYEE WORK RULES

DRESS CODE

Employees will not be allowed in the factory unless properly attired, as follows:

(a) All-leather uppers on shoes which fully cover toes, heels, soles, and insteps. (No high heels)

(b) Slacks or pants which extend down to cover the knees.

(c) Shirts or blouses which cover the shoulders and extend down to cover the waist.

The above code applies only for employees who work in the factory area. It does not apply to employees who work full-time in the office areas. Additional dress requirements in some departments may be required to properly protect employees. These will be posted by the Supervisor.

GROUP I

Discipline 1st Offense: Written Warning
2nd Offense: Final Written Warning
3rd Offense: Discharge

1. Distribution of unauthorized literature on Company property.
2. Solicitation of, or by, employees for sale of tickets, merchandise, publications, etc., on Company property without written permission from the Human Resources Department.

3. Collection of funds without written permission from the Human Resources Department. (Does not include collections for flowers for illnesses or deaths, or 'going-away' gifts for departing employees.)
4. Failure to observe parking and/or traffic regulations on Company property.
5. Failure to apply normal productive effort on an assigned job.
6. Consuming food in the factory other than in designated lunch or break areas. (Beverages are allowed to be consumed in the factory, but only from non-disposable, plastic cups.)
7. Playing of non-gambling games in other than designated lunch or break areas which are segregated from work areas (cards, checkers, chess, cribbage, etc.).
8. Refusal to follow Dress Code (see above).

GROUP II

Discipline: 1st Offense: Final Written Warning
2nd Offense: Discharge

1. Intentionally contributing to unsanitary conditions or poor housekeeping.
2. Failure to clean up accidentally dropped or spilled materials, parts, refuse, etc.
3. Loafing during working hours (unless intentional avoidance of work, in which case more severe disciplinary action will be taken up to and including discharge).

4. Failure to report to First Aid, and/or Supervisor, an accident or injury promptly.

5. Running in the plant, or participating in 'horseplay'. (If 'horseplay' takes the form of possible injury or damage to equipment -- Group III.)

6. Careless handling of machinery, parts or equipment. (The seriousness of the act may result in penalties up to and including discharge.)

7. Withholding and forwarding of more than any one indebtedness by the Employer to satisfy the conditions of a wage deduction summons. (Example: Second occurrence of a wage deduction summons from a different company will result in discharge.)

8. Entering or leaving the plant through any openings other than the designated employee entrance doors. (Except when part of job assignment.)

9. Gambling in any form.

10. Entering the plant at any time other than the designated shift without prior permission from management. (This does not apply to exempt salaried employees.)

11. Failure to properly wear and/or display identification badge.

12. Using profane language of a personally degrading nature to any other person while on Company premises.

13. Threatening bodily harm to any employee or threatening physical damage to Company or personal property.

14. Smoking in designated 'No Smoking' areas.

15. Being away from designated work area for any reason other than Company business without first obtaining Supervisor's permission. (Personal emergencies excepted -- unless abused.)

GROUP III

Discipline: 1st Offense: Discharge

1. Intentional abuse or destruction of Company or another person's property.

2. Removal of Company or another person's property without proper written authorization.

3. Stealing or intentionally hiding Company or another person's property.

4. Refusal to submit to inspection of autos, lunch boxes, purses or other containers when entering, leaving, or while on Company premises.

5. Falsifying any reports or records, including, but not limited to personnel, absence, medical or production records.

6. Clocking in or out another person's clock card.

7. Falsely stating or making claim for illness or injury.

8. Being under the noticeable influence of alcohol or illegal drugs while on Company premises. (Noticeable means by observing erratic behavior, odor, slurred speech, etc.)

9. Personal possession on Company premises of intoxicants or illegal drugs, gambling devices, unauthorized photographic equipment, slugs or counterfeit coins, firearms (loaded or unloaded) or other weapons.

10. Fighting or inciting a fight on Company premises (this includes pulling, pushing or shoving).

11. Insubordinate conduct or refusal to follow any reasonable directive by a Supervisor.

12. Refusing to wear, or use, required safety clothing or equipment.

13. Adjusting, modifying, removing, bypassing or altering any safety device or procedure in any way which will render them less than fully useful for their intended purpose.

14. Sleeping during working hours.

15. Committing any immoral or indecent act.

16. Intentional avoidance of work, such as hiding, during working hours.

SETTLEMENT AGREEMENT

Grievance #B156
Jonna Ruth Lingle,
Badge #1053

The above referenced grievance was heard in arbitration by Mr. Peter J. Maniscalco on June 23, 1986. The Employer, the Grievant, and the Union, recognize and understand that the arbitrator is the sole judge of the dispute between the parties, and that his decision is final and binding. The parties acknowledge that the arbitrator's decision and award provided, by the way of remedy, that:

"The grievant (Jonna Ruth Lingle) be reinstated with full back pay, all seniority rights and be made full, from the date of discharge to the date of reinstatement. The Company be entitled to take credit for any unemployment compensation or outside earnings the grievant has earned in the interim period."

The parties also acknowledge that, after the parties conferred with the arbitrator on November 7, 1986, the Company is also entitled to take credit for time in which the employee was allegedly disabled, that consisting of the period beginning December 7, 1984 to May 26, 1985.

The parties further acknowledge and agree that, in compliance with the arbitrator's award in this matter, Norge company has:

1. Returned the employee to an employed status at their plant in Herrin, Illinois;

2. Restored all of the employee's seniority rights and benefits;

3. Paid to the employee all back wages for which she is entitled, to wit: $10,563.37;

4. Otherwise complied with all directives of the arbitrator's decision and award.

Therefore, it is agreed that the above represents a full and complete settlement of the grievance and no further action may be taken by any of the parties relative to this grievance. It is specifically understood that this settlement does not in any way affect any rights Ms. Lingle may have under her existing retaliatory discharge suit filed in the Federal Court under Case Number 85-2971. Neither does this settlement agreement affect any claims she may have for Worker's Compensation.

Dated this 8th day of December, 1986.

FOR THE UNION:
/s/

GRIEVANT:
/s/ Jonna R. Lingle 12/9/86

FOR THE COMPANY:
/s/

NORGE

STATEMENT OF EARNINGS AND DEDUCTIONS

CHECK NO. 937720

C.C.	RADIO NUMBER	EMPLOYEE NAME	SOCIAL SECURITY NUMBER
06	1053	LINGLE JONNA R	356 44 8068

NET PAY 198.97

937720

CURRENT PERIOD EARNINGS & STATUTORY DEDUCTIONS

PERIOD ENDED	REGULAR HOURS	OVERTIME HOURS	REGULAR EARNINGS	OVERTIME EARNINGS	CODE 1	OTHER EARNINGS	HOLIDAY PAY	GROSS PAY	WITHHELD TAX	FICA	STATE TAX
12 02 84	4000		45604					45604	8611	3056	1140

AMOUNTS WITHHELD AT YOUR REQUEST

UNION DUES	GROUP INSURANCE	UNITED FUND	RETIRE CONTRIB	CREDIT UNION	CODE 2	MISC DEDUCTIONS
1950				9000	4	1950

EXEMPTION AND STATUS INDICATORS

FEDERAL EXEMPTIONS	STATE EXEMPTIONS	MARITAL STATUS	INSURANCE COVERAGE	DEATH FUND
		S	SNGL	YES		

YEAR TO DATE

GROSS EARNINGS	FICA	STATE TAX
1005471	67367	28273

CODE 1
1 VACATION PAY
2 ADJUSTMENTS
3 OTHER

062 NOT NEGOTIABLE

CODE 2
1 TOOLS & BADGES
2 DEATH FUND
4 OTHER

—DETACH THIS STUB BEFORE CASHING—

NORGE

STATEMENT OF EARNINGS AND DEDUCTIONS

CHECK NO. 938582

C.C.	BADGE NUMBER	EMPLOYEE NAME	SOCIAL SECURITY NUMBER		
06	1053	LINGLE JONNA R	356	44	8068

938582

NET PAY
1391 80

CURRENT PERIOD EARNINGS & STATUTORY DEDUCTIONS

PERIOD ENDED	REGULAR HOURS	OVERTIME HOURS	REGULAR EARNINGS	OVERTIME EARNINGS	CODE 1	OTHER EARNINGS	HOLIDAY PAY	GROSS PAY	WITHHOLD TAX	FICA	STATE TAX
12 09 84	2800		31346					31346	4892	2100	734

AMOUNTS WITHHELD AT YOUR REQUEST

UNION DUES	GROUP INSURANCE	UNITED FUND	RETIRE. CONTRIB.	CREDIT UNION	CODE 2	MISC DEDUCTIONS
	500			9000	2	100

EXEMPTION AND STATUS INDICATORS

FEDERAL EXEMPTIONS	STATE EXEMPTIONS	MARITAL STATUS	INSURANCE COVERAGE	DEATH FUND		
		S	SNGL	YES		

CODE 1
1. VACATION PAY
2. ADJUSTMENTS
3. OTHER

062

NOT NEGOTIABLE

YEAR TO DATE

GROSS EARNINGS	WITHHOLD TAX	FICA	STATE TAX
1036817	162082	69467	29057

CODE 2
1. TOOLS & BADGES
2. DEATH FUND
4. OTHER

DETACH THIS STUB BEFORE CASHING

PETITIONER'S

BRIEF

No. 87-259

In the

Supreme Court of the United States

October Term, 1987

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

December 11, 1987

CASILLAS PRESS, INC. 1717 K Street, N.W. Washington, D.C. 20036

QUESTION PRESENTED*

Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the state's workers compensation program, simply because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the meaning or application of the collective bargaining agreement?

---

*All parties to the proceeding in the court below are listed in the caption. In the court of appeals, this case was consolidated with another case, *Martin v. Carling National Breweries*, 823 F.2d 1031, *cert. pending*, 87-859, solely for purposes of *en banc* argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Page

Page

Statutes:

Other Authorities:

In the

Supreme Court Of The United States

October Term, 1987

No. 87-259

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The district court's decision is reported at 618 F. Supp. 1448, and appears at pages 48a to 51a of the Appendix to the petition for a writ of certiorari (Pet. App. 48a to 51a). The *en banc* decision of the court of appeals (there was no panel decision) is reported at 823 F.2d 1031, and is reprinted at Pet. App. 1a to 47a.

JURISDICTION

The judgment of the United States Court of Appeals was issued on June 23, 1987, and is set forth at Pet. App. 52a-53a. The petition for a writ of certiorari was filed on August 13, 1987. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ill. Rev. Stat. 1975, ch. 48, ¶ 138.4(h), provides:

> It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him or her by [the Workers Compensation] Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT

A. *Facts.*

The essential facts are undisputed. On December 5, 1984, petitioner Lingle notified respondent Norge Division of Magic Chef ("Norge") that she had sustained an injury while employed in Norge's manufacturing facility at Herrin, Illinois, and asked, pursuant to the Illinois Workers Compensation Act, Ill. Rev. Stat. Chapter 48, ¶ 138.6, that Norge pay her medical bills. Joint Appendix at pages 2 to 3 ("Jt. App. 2 to 3"). On December 11, 1984, Norge fired Lingle because it asserted that she had filed a false workers compensation claim. Jt. App. 3, 7.

The workers at Norge, including Lingle, are represented in collective bargaining by Machinists Local 554, Jt. App. 5, and they were in 1984 and continue today to be covered by a collective bargaining agreement which protects them against discharge without "just cause." Jt. App. 14, ¶ 26.2. The agreement contains an arbitration procedure, which applies only to "grievances," a term defined to mean disputes about "the effect, interpretation, application, claim of breach or violation of this Agreement," Jt. App. 10, ¶ 7.1. Under that procedure, the arbitrator is forbidden to "add to, subtract from, or modify any of the terms of this Agreement, or to establish any conditions not contained in this Agreement." Jt. App. 11, ¶ 8.2. The Agreement makes the grievance and arbitration procedure the exclusive means of resolving a "grievance." Jt. App. 11, ¶ 8.5.

On the same day that Lingle was fired, her union filed a grievance that denied Norge's assertion that her workers compensation claim was false. It pointed out that Lingle was still under treatment by a doctor and that company policy required Lingle to make the report. Thus, the union asked that she be reinstated with full seniority rights and back pay. Jt. App. 6, 7. When this case was initially argued in the court of ap-

peals on May 29, 1986, a year and a half after her discharge, an arbitrator had been selected, but a hearing had not yet been held on her grievance. Jt. App. 6.

Subsequently, the arbitrator ruled that Lingle's discharge was contrary to the contractual just cause requirement, and ordered that she be reinstated with back pay. However, under the Illinois law on which she relies in this case, Lingle could be awarded other damages in addition to back pay, such as for emotional distress, as well as punitive damages, which were not sought and could not have been awarded by the arbitrator. Lingle also contends that she is entitled to additional damages under Illinois law because the job to which she was reinstated was not as desirable as the one that she held before she was fired, and because the back pay awarded under the contract was not based on fully compensatory rates.[1] Therefore, she continues to pursue this action based on the Illinois retaliatory discharge statute.

B. *Proceedings Below.*

On July 9, 1985, after her grievance had been pending for nearly seven months, petitioner filed a complaint against Norge

[1]For example, in the weeks immediately preceding her discharge, Lingle was earning over $11.00 per hour. Jt. App. 27-28. However, ¶ 26.2 of the contract allows back pay for incentive employees, such as petitioner, based on a special low rate known as "down time." Jt. App. 15. The down time rate was $5.25 per hour beginning June, 1985, and $5.50 per hour beginning June, 1986, Jt. App. 12, ¶ 18.15, which was only half of Lingle's actual hourly earnings.

Indeed, incentive employees who apply "incentive effort" are guaranteed a minimum of the base rate plus 50%. Jt. App. 12, ¶ 18.20. The record shows that even the lowest regular pay rate was $4.28 per hour beginning in June, 1985, and $4.44 per hour beginning June 1986. Jt App. 16-19. Thus, even the lowest paid incentive worker who applied incentive effort was guaranteed over a dollar more per hour than the down-time rate at which back-pay is calculated ($6.42 per hour as of June 1985, and $6.66 per hour as of June, 1986, as compared to $5.25 and $5.50 per hour, respectively).

in the Illinois Circuit Court for Williamson County, alleging that she had been discharged solely because she had exercised her rights under the workers compensation laws of Illinois, and claiming that such discharges were forbidden by Illinois law. On August 21, 1985, Norge removed the case to the United States District Court for the Southern District of Illinois on the basis of diversity jurisdiction, 28 U.S.C. §§ 1332 and 1441, and on September 16, it moved to stay the proceeding pending arbitration or in the alternative to dismiss the action for lack of subject matter jurisdiction. Norge's theory was that Lingle's only remedy for her discharge was to pursue the grievance and arbitration procedures set forth in the collective bargaining agreement.

In opposition, Lingle argued that her rights under Illinois law did not depend in any way on the provisions of her union contract, and thus that there was no basis for relegating her to the contractual remedies. She noted that in *Midgett v. Sackett-Chicago*, 105 Ill.2d 143, 437 N.E.2d 1280 (1984), the Illinois Supreme Court had held that the state tort remedy for retaliatory discharge, which had previously been created in a case involving nonunion employees, applies to unionized employees as well, and that employees need not exhaust their contractual grievance remedies before asserting their rights under state law. Rather, it held, the state has an important interest in providing prompt protection from unscrupulous employers to all employees who choose to assert their rights under its workers compensation law. 105 Ill.2d at 154.

Nevertheless, the district court dismissed the complaint, holding that Lingle's claim was preempted by section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. Pet. App. 51a. It decided that Lingle's claim was similar to that in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), where this Court held that section 301 preempted an

employee's suit based on the tort of bad faith denial of benefits arising out of the union contract. Despite the fact that, unlike the plaintiff in *Allis-Chalmers*, a plaintiff under the Illinois retaliatory discharge doctrine need not prove a violation of the collective bargaining agreement, the district court stated that petitioner's state law claim is "inextricably intertwined" with the contract provision forbidding discharge without just cause. Pet. App. 50a. It also asserted that allowing such a claim would change the legal consequences of contract violations, and hence would upset the mechanisms devised by the contract for redressing such violations. *Id.* Accordingly, it dismissed the complaint.

A divided *en banc* court affirmed.[2] The majority, in an opinion authored by Judge Flaum, agreed with the district court that a finding of preemption was required by *Allis-Chalmers v. Lueck*, *supra*. The majority concluded that a worker who invokes a state law forbidding retaliatory discharge is really complaining that the discharge lacked "just cause." Because the collective bargaining agreement forbids discharges without just cause, the court concluded that a plaintiff in a retaliatory discharge case is *necessarily* invoking a contractual right whose resolution depends on an analysis of the terms of the contract. 823 F.2d at 1044, Pet. App. 24a-25a. The majority responded to petitioner's argument that Illinois law permits a finding of retaliatory discharge without any interpretation of the contract, by stating that, in order to determine whether a state tort claim is intertwined with a contract, a court must analyze the scope of the contract, not the scope of the tort. 823 F.2d at 1046, Pet. App. 28a. Otherwise, the majority opined, states could "circumvent the arbitration and grievance procedures envisioned by the Congress as ex-

[2]The case was initially argued before a three-judge panel, but before a decision had been issued, the court of appeals *sua sponte* ordered reargument *en banc*.

clusive" by defining their torts to avoid any need to construe the contract. 823 F.2d at 1046, Pet. App. 28a-29a. Finally, the majority stated that, because a retaliatory discharge claim requires a court to decide "if the employee would have been discharged absent the state-law-proscribed motive," it would necessarily have to decide whether the nonproscribed motive constituted just cause under the collective bargaining agreement. 823 F.2d at 1046, Pet. App. 29a.

In dissent, Judge Ripple, joined by Judge Cudahy, accused the majority of relying on its "own predilections" and disregarding this Court's controlling precedent. 823 F.2d at 1051, Pet. App. 40a. They focused on *Allis-Chalmers*, in which this Court decided that the state claims there were preempted, but also cautioned that preemption would not apply to "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 823 F.2d at 1052, Pet. App. 41a, *quoting* 471 U.S. at 212. Moreover, they pointed out that this Court had previously dismissed, for want of a substantial federal question, an appeal from a decision by the Hawaii Supreme Court that the Railway Labor Act did not preempt that state's retaliatory discharge cause of action. 823 F.2d at 1055 n.5, Pet. App. 46a n.5, *citing Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985).

Turning to the specific claims asserted here, Judge Ripple noted that petitioner asserted no rights under the contract; her claims neither depended on rights established by the contract, nor even required reference to the contract. 823 F.2d at 1053, Pet. App. 43a. Moreover, Judge Ripple observed, the majority had ignored the state's strong interest in protecting all employees, union and nonunion alike, who seek to exercise their rights under its workers compensation program. 823 F.2d at 1053-1054, Pet. App. 44a. Finally, he reasoned that even if an employer seeks to justify the discharge as having

been motivated by nonretaliatory reasons, there is no danger of the court becoming entangled in contract questions because, under state law, it is irrelevant whether the employer's alleged nonretaliatory reason is itself forbidden by the contract. Under Illinois law, if the employer's actual reason was nonretaliatory, the employee loses the lawsuit. 823 F.2d at 1054, Pet. App. 45a. As the dissent concluded, the majority's holding amounted to a conclusion that, by simply including a "just cause" provision in a collective bargaining agreement, employers could "preclude[ ] state enforcement of important state governmental interests" pertaining to an unlimited variety of employment related subjects. 823 F.2d at 1054-1055, Pet. App. 46a.

The Court granted certiorari on October 13, 1987. 108 S.Ct. 226.

SUMMARY OF ARGUMENT

The decision below should be reversed because section 301 of the Labor Management Relations Act does not prevent Illinois from protecting employees from employer retaliation for filing workers compensation claims. The fundamental flaw in the analysis of the court below is its assumption that all rights which Lingle enjoys against her employer are found in her union contract. In *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), the Court expressly rejected that theory of labor law. Rather, the Court has repeatedly held that the system of collective bargaining between unions and employers exists side-by-side with numerous state and federal laws regulating the substantive terms and conditions of employment and protecting all employees, whether or not they are represented by a union and covered by a union contract, against retaliation or discrimination based on a number of grounds.

In *Allis-Chalmers*, this Court expressly limited the preemptive effect of section 301 to state law claims which depend on a violation of rights protected by a collective bargaining agreement, and it has emphasized in a number of subsequent cases that section 301 does not preempt claims that are based on a source of rights that is independent of the collective bargaining agreement. If there are any employment-related rights which are independent of collective bargaining agreements and are therefore not preempted, the Illinois workers compensation retaliatory discharge claim is one of them. Because Lingle's sole claim is that her employer violated Illinois law by retaliating against her for seeking workers compensation benefits, her claim is not in any respect dependent on rights secured by her union's collective bargaining agreement. Indeed, Lingle could bring the same claim even if she were not covered by a collective bargaining agreement.

Moreover, a state law procedure creating rights independent of any collective bargaining agreement does not undermine either the contractual rights or the procedure for resolving disputes arising under the contract. Public laws protecting working conditions commonly co-exist with contractual grievance procedures protecting similar rights under a contract, and this Court has repeatedly refused to relegate the enforcement of such substantive protections to union control in arbitration. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The State of Illinois has made the judgment with respect to its retaliatory discharge laws, as Congress has decided with respect to many federal employment laws, that the remedies available to employees in arbitration under collective bargaining agreements may not be sufficient to protect the public policies which underlie the state cause of action. Because Congress has not deprived the states of the right to make and implement such policy judgments, employees are free to invoke either or both their contractual and their state-law rights.

ARGUMENT

CONGRESS HAS NOT FORBIDDEN ILLINOIS TO PROTECT UNIONIZED EMPLOYEES AGAINST EMPLOYER RETALIATION BASED ON THEIR EXERCISE OF THE RIGHT TO SEEK BENEFITS UNDER ITS WORKERS COMPENSATION LAWS.

There can be no question that, if the Congress chose to define the circumstances under which employees who are injured on the job could seek compensation, it would have the power under the Commerce Clause to do so. And if Congress wished to make its regulatory scheme the exclusive means of seeking such compensation, presumably it would also have the power under the Supremacy Clause to prevent the states from legislating in this field. However, before this Court can forbid Illinois to regulate in this area, it must first conclude that Congress intended this result. As the Court has repeatedly stated in labor law preemption cases, Congress' intent is "the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), and *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Moreover, given the respect due to the states in our federal system, there is a strong presumption against finding Congressional intent to preempt state laws. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981); *see also California Federal v. Guerra*, 107 S. Ct. 683, 689 (1987).

The courts below never made any inquiry about whether preemption in cases such as this would be consistent with congressional intent. However, as we now show, not only is there no evidence to support a Congressional purpose to preempt state protections for employees who file workers compensation claims, but a review of the statutes Congress has passed

and of this Court's recent decisions shows that states remain free to provide such protection. Moreover, allowing Lingle's claim would neither undermine arbitration procedures, nor allow the state courts to construe collective bargaining agreements free from the constraints imposed by the law developed under 29 U.S.C.§ 185.

A. The Labor-Management Relations Act Encourages the Enforcement of Collective Bargaining Agreements by Arbitration, But Also Permits States to Give Unionized Employees a Remedy Against Employers Who Seek to Punish Them for Invoking Rights Under State Statutes Such as Workers Compensation Laws.

Had the court below ruled that a state law was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*, this Court would look to the detailed scheme established by Congress under that Act to decide whether state regulation would upset the delicate balance established by the Congress among the rights of individual employees, the collective interest of labor organizations, and the interests of employers. *E.g., Beasley v. Food Fair*, 416 U.S. 653 (1974); *New York Telephone Co. v. New York Dept. of Labor*, 440 U.S. 519 (1979). However, not only did Norge's appellate brief below expressly disclaim reliance on NLRA preemption, at 17, but nothing in that Act purports to regulate the way in which employees may apply for workers compensation. Nor does that Act govern the termination of employment, other than to forbid employers to punish employees for exercising their rights under the Act, such as by joining a union or going on strike.

The question in this case is whether state regulation is preempted by section 301 of the LMRA. Neither the language

of the statute itself, nor its legislative history, provides a basis for concluding that certain forms of state regulation would be inconsistent with Congress' purpose. In fact, the whole thrust of section 301 is that Congress has assigned to the courts the development of a federal common law of collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Because this law has been developed by the unelected judiciary essentially on its own, without substantial guidance from Congress, the courts should be particularly circumspect about making the policy judgments that are implicit when state laws, based on public policies deemed important by the several states, are overridden on the ground of conflict with section 301. This Court has ruled that the application of state contract law to determine the meaning of collective bargaining agreements would be inconsistent with the task, assigned by Congress to the federal courts, of developing a federal common law to govern those agreements. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). But the Court has never done what respondent asks it to do in this case, *i.e.*, hold that a state's substantive regulation of the terms and conditions of employment, which operates independently of the terms of the union contract, is supplanted by the law of the collective bargaining agreement.

It could be argued that, whenever a state regulates employment conditions in any respect, it is affecting the balance of power between unions and employers, and giving employees "for free" a right or remedy which they might otherwise be required to obtain through collective bargaining by trading away other benefits which they might desire. If that were sufficient to void the substantive regulation, the only rights a unionized employee would have would be those which the union has won at the bargaining table.

But if there is one precept which is clear about Congressional intent in the labor field, it is that Congress intended that the federally encouraged system of collective bargaining would exist side-by-side with a wide variety of laws governing many substantive terms in the employment relationship, such as health and safety, pensions, wages and hours, and even workers compensation. *E.g*, Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.;* Employee Retirement Income Security Act, 29 U.S.C. §§ 1101 *et seq.;* Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.;* Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* Indeed, the same Congress that enacted section 301 in 1947 also passed the Selective Service Act of 1948, whose protections for the reemployment of veterans were intended to be enforced by civil actions in addition to, or even contrary to, claims that could be asserted under collective bargaining agreements. Pub. L. No. 62-759, Title I, § 9, 62 Stat. 614-618. *See also Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 520 (1949).

Not only do various federal substantive requirements create rights for individual employees apart from the collective bargaining agreement, *e.g., Jewell Ridge Coal Corp. v. Mine Workers Local 6167*, 325 U.S. 161, 167 (1945), but they also create enforcement mechanisms which may be invoked notwithstanding any limitations which might be imposed on the enforcement of contractual rights pertaining to the same subject matter. *E.g., Barrentine v. Arkansas-Best Freight Syst.*, 450 U.S. 728 (1981). Among the forms of regulation of the employment relationship that Congress expects to be covered by public law, in addition to private law that might be created by collective bargaining, is the discharge of employees because they have exercised their rights under one of the many federal statutes applicable to their employers. Indeed, the federal statute which regulates workers compensation for maritime

employees also forbids retaliation for making claims or testifying under that act. LHWCA Section 49, 33 U.S.C. § 948a.[3]

Nor has Congress said that the states may not impose additional substantive terms and conditions on the employment relationship. To the contrary, the states have traditionally been allowed to legislate in such areas as workers compensation, wages and hours, and employment discrimination. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Indeed, if anything, Congress has taken particular care to avoid interference with state workers compensation programs. *See* Brief of the National Conference of State Legislatures, *et al.*, as *Amici Curiae*, at pages 9 to 14. To be sure, in some statutes Congress explicitly barred state regulation of the same subject. *E.g.*, Section 514, Employee Retirement Income Security Act, 29 U.S.C. § 1144. But Congress' explicit decision to preempt state regulation of a few, select substantive subjects makes it highly unlikely that Congress intended to deny states the right to regulate other terms and conditions of employment not specifically preempted by federal legislation. *See Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978). To the contrary, as the Court observed when it held that state minimum labor standards are not preempted, "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimum standards on non-union employers." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

The states' ability to maintain effective programs depends on their ability to protect the freedom of the beneficiaries of

[3]A list of federal statutes that forbid retaliatory discharge for one reason or another is set forth in the addendum to this brief.

the programs to apply for the benefits to which they are entitled. Obviously, as the dissent below observed, if employers could punish employees when they seek to take advantage of benefits provided by state law, they could prevent employees from enjoying those benefits, and thus prevent the state from attaining the policy objectives for which those laws were designed. 823 F.2d at 1054, Pet. App. 45a. Accordingly, most states have provided a retaliatory discharge remedy for employees who are fired for asserting at least some of their state law employment rights. *See* Appendix to Brief of the State of Minnesota, *et al.*, as Amici Curiae in Support of Petitioner.[4] As the great weight of lower court authority holds, Congress has no more forbidden the states to create such remedies than it has barred the substantive programs that retaliatory-discharge laws are designed to protect from employer interference.[5]

The majority in the court below was of the view that *Allis-Chalmers v. Lueck* requires a contrary result, but its reading of that decision ignores this Court's express caution to the

[4]The fact that Congress has expressly forbidden the removal of actions arising under state workers compensation laws, 28 U.S.C. § 1445(c), is further evidence of its intent to allow the states to protect employees who exercise rights under those laws.

[5]*Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir 1987), *cert. pending*, No. 87-318; *Herring v. Prince Macaroni*, 799 F.2d 120, 124 n.2 (3d Cir. 1986); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987); *Peabody Galion v. A.V. Dollar*, 666 F.2d 1309, 1320-1323 (10th Cir. 1981); *Messenger v. Volkswagen of America*, 585 F. Supp. 565 (S.D. W. Va. 1984); *Benton v. Kroger Co.*, 635 F. Supp. 56, 57-58 (S.D. Tex. 1986); *Trombley v. Ford Motor Co.*, 666 F. Supp. 972 (E.D. Mich. 1987); *Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 503 N.E.2d 308 (Ill. 1986); *Yoho v. Triangle PWL*, 336 S.E.2d 204 (W.Va. 1985); *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), *app. dism.*, 472 U.S. 1001 (1985); *MGM Grand Hotel-Reno v. Insley*, 728 P.2d 821 (Nev. 1986). *Contra*, *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987); *Smith v. Montana Power Co.*, 731 P.2d 924 (Mont. 1987).

contrary. In *Allis-Chalmers*, an employee, Lueck, had sued both his employer and its insurance company, Aetna, which issued a group health and disability policy required by the collective bargaining agreement between Allis-Chalmers and the United Auto Workers, which represented Lueck. Lueck asserted that Aetna and Allis-Chalmers repeatedly failed to make the payments required under the collectively-bargained insurance policy, without a reasonable basis for doing so, and thus had committed the tort of dealing with him in bad faith. The Supreme Court of Wisconsin held that, although the tort arose as a consequence of the contractual relationship, it was independent of the contract itself. Accordingly, it concluded that the state law rights were not preempted by the conditions imposed on employee-employer contract suits under section 301.

This Court reversed because the collective bargaining agreement regulated both the payments that were required under the insurance policy and the manner in which the payments were to be made. The agreement also provided a grievance and arbitration procedure through which claims of contract violations could be adjudicated. Accordingly, the Court reasoned, if a state could create a tort which is defined by the contractual obligation, and whose application depends on a particular construction of the terms of the agreement, it would be able to evade the Congressional "mandate[ ] that federal law govern the meaning given contract terms." 471 U.S. at 218-219. The state would also be able to deprive unions and employers of "their federal right to decide who is to resolve contract disputes." *Id.* at 220. Hence, preemption was required to protect "the congressional goal of a unified federal body of labor-contract law," *id.* at 219, and the fact that the state chose to label the claim as a tort rather than a contract violation did not prevent the application of the preemption doctrine.

But the Court was also careful to point out the limits of its ruling. Not only does section 301 not regulate the substance of the parties' collective agreement, *id.* at 211, but Congress has carefully avoided either dictating the terms of collective agreements, *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), or "giv[ing] the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." *Allis-Chalmers*, 471 U.S. at 212. As the Court explained, in language ignored by the majority opinion in the court below,

> Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collectively-bargained agreement the ability to contract for what is illegal under state law. *In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.*
>
> *Id.* (emphasis added).

Thus, rather than supporting respondent, *Allis-Chalmers* requires precisely the opposite result.

Moreover, the Court has reaffirmed this aspect of *Allis-Chalmers* on at least three separate occasions, none of which was discussed by the majority opinion below. First, less than two months after *Allis-Chalmers* was decided, the Court dismissed, for want of a substantial federal question, an appeal from a decision of the Hawaii Supreme Court refusing to find preemption of a state claim by a worker that she had been discharged in retaliation for filing a workers compensation claim. *Pan American World Airways v. Puchert*, 472 U.S.

1001 (1985), dismissing appeal from *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984). The appeal was based solely on the claim that discharges could be remedied under the collective bargaining agreement and the accompanying grievance procedure, and thus any state claim was preempted by federal labor laws favoring exclusive use of that procedure. *See* Jurisdictional Statement, October Term, No. 83-1952, Questions Presented. Although the preemption urged in *Puchert* was based on the Railway Labor Act, that Act has at least as much preemptive effect as section 301 of the Labor-Management Relations Act, if not more. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972).

Second, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court cited *Allis-Chalmers* in support of its ruling that a state law setting minimum standards for group health insurance was not preempted by either the NLRA or a collective bargaining agreement. 471 U.S. at 755-756. And third, in a case in which the Court held that a state law contract claim was not removable on grounds of preemption by section 301, the Court ruled that "Section 301 does not . . . require that all employment related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by § 301. . . . Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they were asserted by an individual covered by such an agreement are simply not preempted by § 301." *Caterpillar v. Williams*, 107 S. Ct. 2425, 2432 n.10 (1987). *See also IBEW v. Hechler*, 107 S. Ct. 2161, 2166-2167 and n.3 (1987).

These three post-*Allis-Chalmers* decisions, as well as *Allis-Chalmers* itself, make it clear that Lingle's state law retaliatory discharge claim is not preempted by section 301 unless it is

dependent on the collective bargaining agreement, an issue to which we now turn.

B. The Right Asserted by Lingle Under Illinois Law Is Independent of Any Rights That She May Enjoy Under the Collective Bargaining Agreement.

Lingle's state law claim did not mention any rights under the collective bargaining agreement, and does not directly or indirectly depend upon that agreement. Under Illinois law, a retaliatory discharge claimant must establish two elements: "(1) he was discharged or threatened with discharge and (2) the employer's motive . . . was to deter him from exercising his rights . . . or to interfere with his exercise of those rights." *Horton v. Miller Chem. Co.*, 776 F.2d 1351, 1356 (7th Cir. 1985). *See also Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 10, 503 N.E.2d 308, 312 (1986). Unlike the claim in *Allis-Chalmers*, which was a contract claim in tort's clothing, the retaliatory discharge claim made by Lingle here, which was based on rulings of the Illinois Supreme Court in such cases as *Midgett v. Sackett-Chicago, supra*, and *Kelsay v. Motorola*, 74 Ill.2d 172, 384 N.E.2d 353 (1978), is not derived in any way from the rights that she enjoys as a result of the union's collective bargaining agreements with her employer. *See Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d. 1, 9-10, 503 N.E.2d 308, 312 (1986). *See also Byrd v. Aetna Cas. & Sur. Co.*, 152 Ill. App.3d 292, 297-298, 504 N.E.2d 217, 220 (1987) ("the rights and duties created by the Act were not the subject of any bargaining between the parties. The contract did not embody the expectations of the parties regarding workers' compensation. Those expectations arose exclusively from the statute.").

Nevertheless, the majority below repeatedly asserted that Lingle's claim for retaliatory discharge is "substantially depen-

dent upon an analysis of the terms of the collective bargaining agreement," 823 F.2d at 1044, 1046, 1048, Pet. App. 4a, 28a, 33a, and "inextricably intertwined with the collective bargaining agreement." 823 F.2d at 1047, Pet. App. 30a. But announcing and repeating this conclusion does not make it correct. Thus, the majority never denied that Lingle could have filed precisely the same claim against her employer had she worked in an unorganized shop where she did not enjoy the protections of a collective bargaining agreement. Indeed, the majority mistakenly suggested that it was improper to look to the elements of Lingle's cause of action, because the important question was what her contract allows, not what her state claim requires her to prove. 823 F.2d at 1046, Pet. App. 28a.

The majority's analysis thus boils down to two separate propositions. First, when a worker is covered by a collective bargaining agreement, and thus has a potential federal contractual remedy against the employer, that remedy is necessarily exclusive of any state remedies. 823 F.2d at 1044, Pet. App. 24a. *See also* 823 F.2d at 1048, Pet. App. 33a ("if a decision on the plaintiff's claim could be decided under the just cause provision of the collective bargaining agreement, then it is immaterial that the plaintiff's claim could also be decided with reference to the state statute"); 823 F.2d at 1046 n.17, Pet. App. 29a n.17 (preemption is required if there are "overlapping remedies for discharges"). Put another way, the majority below thought that if a worker has two parallel claims, one under state law and one under the contract, the state claim is automatically the "same" as the contract claim, and thus the two are intertwined and mutually dependent.

Second, the majority reasoned that in deciding whether the employer had the motive proscribed by state law, a state court would necessarily have to decide whether the employer had

a valid reason for acting, *i.e.*, one permitted by the contract. 823 F.2d at 1046, Pet. App. 29a. The majority assumed that the state courts would have to decide whether there was contractual just cause notwithstanding the fact that the Seventh Circuit had itself previously held, in a case not raising preemption issues, that the absence of just cause did not demonstrate that an employee was fired in violation of Illinois retaliatory discharge law. *Horton v. Miller Chem. Co., supra,* 776 F.2d at 1359.

But even if the state law and contractual claims were parallel, and even if employers sometimes defended on the ground that the discharge was based, not on retaliation, but on some ground authorized by the contract, that would not mean that, in asserting rights under Illinois law, Lingle was attempting to enforce the terms to which the union and employer had agreed, or that enforcement of her state law rights would undermine the arbitration procedure. After all, organized employees frequently have occasion to assert rights under federal statutes protecting working conditions that are parallel in some respects to rights that may have been negotiated in a collective bargaining agreement -- indeed, many union contracts expressly incorporate various federal statutory rights. Yet it has never been the law that such rights, or the statutory procedures for enforcing them, are supplanted by the collectively bargained grievance and arbitration process.

To the contrary, this Court has repeatedly held that employees may invoke their federal statutory rights by using the statutory enforcement procedures either in addition to, or instead of, the contractual arbitration process. *McDonald v. City of West Branch,* 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Syst.,* 450 U.S. 728 (1981); *Electrical Workers v. Robbins & Myers,* 429 U.S. 229 (1976); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). *See also Atchison, Topeka & S.F. Ry. v. Buell,* 107 S. Ct. 1410 (1987). The Court

has reasoned that unions will not always be willing to protect the federal statutory right of individual employees in the arbitration procedure, and that arbitration cannot provide sufficient protections to assure the vindication of the federal interests which led Congress to provide judicial remedies for violations of such federal laws. Furthermore, the Court has expressly rejected the contention, advanced by the majority below, 823 F.2d at 1046, Pet. App. 28a-29a, that allowing organized employees to litigate their statutory rights in federal court would undermine the federal policy favoring arbitration of contract disputes, either by undercutting the grievance procedure or by discouraging employers from agreeing to include arbitration clauses in collective bargaining agreements. *Gardner-Denver, supra,* 415 U.S. at 54-55.

Although all of the above cases involved federal statutes, while petitioner's claim is based on state law, that distinction is irrelevant to the issue of section 301 preemption. The symmetry of treatment of federal and state claims is borne out by the fact that, in *Metropolitan Life,* the Court cited *Barrentine* and *Gardner-Denver* as authority for the proposition that unionized employees should not be denied the benefit of state minimum employment standards: "We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards." 471 U.S. at 755. And in *Colorado Anti-Discrimination Commission v. Continental Air Lines,* 372 U.S. 714 (1963), the Court held that state civil rights laws could be enforced notwithstanding the arbitration policies fostered by the Railway Labor Act which, as we have seen, *supra* at 18, has at least as much preemptive effect as section 301. Indeed, given the general presumption against preemption of state law, there is no basis to assume that Congress intended to permit independent federal claims to proceed, but to deny similar treatment to independent state claims.

Thus, even if Lingle's state law claim finds an exact parallel in the just cause provision of the collective bargaining agreement, and even if during the litigation of the state law claim, the employer may advance the defense that the discharge was motivated by some reason allegedly authorized by the collective bargaining agreement, that is no more than could be said of the claims in *Gardner-Denver, McDonald,* and *Barrentine,* all of which were allowed to proceed in the face of preemption claims virtually identical to those made here. If Congress did not intend to preclude the federal claims, there is no reason to hold that Congress intended to preclude the state claims either.

C. Preemption Would Cripple Illinois' Ability to Protect Its Workers Compensation System From Abuse, and Is Not Required by the National Labor Policy Favoring Arbitration of Contract Disputes.

States should be entitled to conclude, as Congress has concluded in a number of instances, *supra* at 13-14; 21-22, and as the Illinois Supreme Court said in *Midgett,* that the public policies which led them to create workers compensation programs, and to protect employees against retaliation for invoking their rights under it, will not be adequately served by requiring organized employees to seek vindication through their unions in the arbitration process. 105 Ill.2d at 150, 473 N.E.2d at 1283-1284. There are several reasons why states may reasonably conclude that arbitration should not be the exclusive means of protecting important state interests.

First, arbitration may not provide a forum in which statutory rights can be vindicated at all. For example, the contract in this case expressly limits grievances to claims concerning the collective bargaining agreement, Jt. App. 10, ¶ 7.1, and forbids the arbitrator to modify or add to the contract, Jt. App.

11, ¶ 8.2, thus barring reliance on public law where it is different from the contract. Moreover, arbitration rarely provides the same procedural protections as the state courts, such as the availability of discovery, the right to be represented by counsel, and trial by jury.

Second, states may reasonably conclude that collective bargaining agreements will not provide remedies that are adequate to protect state programs from interference by employer abuses. *Midgett, supra,* 105 Ill.2d at 150, 473 N.E.2d at 1284.

For example, this Court has recognized that even an eventual award of reinstatement with full back pay may not provide sufficient protection to encourage employees to exercise their statutory rights, because they may lose their mortgages, become unable to pay necessary expenses for their families, or otherwise suffer injuries not fully remedied by a simple award of back pay years later. *Brock v. Roadway Express,* 107 S. Ct. 1740, 1745-1746, 1748 (1987).

This problem is particularly acute for employees who work under contract provisions, like the collective bargaining agreement in this case, which provide for back pay at lower rates than they would have earned had they been working during the period of their discharge. *Supra,* 4 n.1. Indeed, the "down-time" rate at which she was awarded back pay was only about half as much as the hourly rates she was actually earning, under the company's piece-work rates, in the weeks immediately preceding her discharge. Jt. App. 27-28 (showing hourly earnings in excess of eleven dollars per hour).

It may have been entirely rational and defensible for Lingle's union to have made this concession regarding back pay rates in collective bargaining, either because it was economically weak or because it obtained some other important contract provision in return. But the State of Illinois should not be compelled to agree to make the same concession in the enforce-

ment of its own public policies, if it concludes that a company might decide that it is profitable to fire employees who exercise their statutory rights as a deterrent to other workers' exercise of their rights, even if it eventually has to provide reinstatement with back pay (less the worker's interim earnings) years later. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769, 1788-1793 (1983). In light of this problem, many federal retaliatory discharge statutes include provision for various incentives in addition to reinstatement and back pay that add to the employer's costs if it violates the law, ranging from statutory penalties, *e.g.* 33 U.S.C. § 948a (requires fine between $1000 and $5000), to compensatory damages, *e.g.*, 49 U.S.C. § 4305(b)(2)(B)(iii)(1987 Supp.), and awards of attorney fees. *E.g.*, 28 U.S.C. § 1875 (1987 Supp.) (provides for court-appointed attorney plus attorney fees against losing employer).

The Illinois Supreme Court has decided that both compensatory and punitive damages are necessary to deter employer violations of state laws forbidding retaliatory discharge, *Midgett,* 105 Ill.2d at 149, 473 N.E.2d at 1283, and there is no basis for concluding that Congress wished to preclude that exercise of the state's police power. Given the strong presumption against preemption of state laws relating to health and safety, as the workers compensation system surely does, the absence of a "clear and manifest" Congressional purpose to preempt the state laws precludes a finding of preemption here. *Hillsborough County v. Automated Med. Labs.,* 471 U.S. 707, 715 (1985).

Third, a state may conclude that it cannot rely on unions to fully enforce its public policies through the grievance procedure. Under federal law, unions are given the right to decide not to pursue the contract claims of individual

employees, either because the union does not believe that the claim is meritorious, *Vaca v. Sipes*, 386 U.S. 171, 191 (1967), because the union cannot afford to take the claim to arbitration, *e.g.*, *Fritz v. Production Plated Plastics*, 125 LRRM 3452, 3454 (E.D. Mich. 1987), because a particular claim is inconsistent with the collective interest of those whom the union represents, *Humphrey v. Moore*, 375 U.S. 335, 349-350 (1964), or for a variety of other legitimate reasons. If Illinois had to rely on union enforcement of its public objectives, subject only to the duty of fair representation, "the public policy of this State would become a mere bargaining chip, capable of being waived or altered by the private parties to a collective bargain." *Gonzalez v. Prestress Enginering Corp.*, 115 Ill.2d 1, 10, 503 N.E.2d 308, 312 (1986). Although Congress has decided that the enforcement of contractual rights which were created by the union's bargaining efforts should be left to the union, Illinois should be entitled to insist on providing judicial procedures to enforce public law rights that the State, not the union has created.[6]

The majority below concluded that in the long run, more employers will be deterred from improperly discharging their employees by a strong arbitration system than by the remedies afforded by Illinois law. 823 F.2d at 1047, Pet. App. 30a. That policy judgment may be correct, or it may be wrong, but as this Court had occasion to remind the Seventh Circuit only last Term, preemption analysis does not require the states to subscribe to any particular economic theory, whether propounded by judges or legislators. *CTS Corp. v. Dynamics*

[6]By contrast, where the employee has been fired in retaliation for having asserted rights granted only by a private agreement, Illinois has decided, as a matter of state law, that no retaliatory discharge claim may be maintained. *Price v. Carmack Datsun*, 109 Ill.2d 65, 485 N.E.2d 359 (1985).

Corp. of America, 107 S.Ct. 1637, 1651 (1987). *See also id.* at 1653 (Justice Scalia, concurring) ("a law can be both economic folly and constitutional"). Similarly, section 301 does not bar Illinois from making the judgment, based on these and other considerations, that its public policies are not adequately served by union-employer arbitration alone.

The majority opinion below, and respondent's response to the petition for certiorari, raised a number of policy concerns about the effect of permitting Lingle's parallel state claim to proceed. For example, the majority contended that by allowing independent claims, the courts might discourage employees from exercising their right to engage in collective bargaining because union organizers could no longer claim that unionization would protect the workers against arbitrary discharge. 823 F.2d at 1047, Pet. App. 30a. *See also* Response to Petition at 6 ("parallel avenues for relief would denigrat[e] free collective bargaining").[7]

But precisely the opposite is true. If, as the majority below held, only non-union workers may assert state-law rights, the employer could argue during an organizing campaign that if workers vote for the union, they will lose that state law protection. Indeed, if a state law provided that employees would forfeit state law benefits if they chose to engage in collective bargaining, that rule might itself be preempted under the NLRA because it discourages the exercise of section 7 rights. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). That possibility of NLRA preemption is yet another reason to reject the section 301 preemption upheld by the majority below.

[7]Thus, the majority below asserted that rejecting preemption "would be detrimental to unions." 823 F.2d at 1047, Pet. App. 30a. However, the AFL-CIO, which is filing as *amicus curiae* in support of petitioner, apparently does not share the majority's opinion.

Respondent has also argued that preemption is necessary to further the federal labor policy favoring arbitration of contract disputes, on the theory that the availability of dual means of enforcing parallel rights will discourage the parties from arbitrating their disputes. Response to Petition, at 5-6. *See* also 823 F.2d at 1046, Pet. App. 28a-29a (preemption required so that states cannot "circumvent the arbitration and grievance procedures envisioned by the Congress as exclusive"). But the federal policy favoring labor arbitration does not extend to the arbitration of statutory claims, but applies only to "settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." LMRA Section 203(d), 29 U.S.C. § 173(d). Moreover, in *Gardner-Denver* this Court rejected the argument that allowing independent statutory remedies for discriminatory discharges "would sound the death knell for arbitration clauses in labor contracts." 415 U.S. at 54. The Court observed that there are many reasons why parties adopt and use arbitration procedures, including their therapeutic value, their relative convenience, and the fact that arbitration is generally the quid pro quo for the no-strike clause. *See also Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). These reasons, the Court determined, make it highly unlikely that the parties will abandon arbitration simply because a few employees may pursue statutory claims rather than, or in addition to, the grievance procedure. 415 U.S. at 54-55.

This prediction has been borne out by the test of time. Thus, despite the dire warnings of the employers in *Gardner-Denver*, the proportion of collective bargaining agreements containing arbitration clauses has increased slightly since that case was decided, from 96% in 1975 to 99% in 1986, and the proportion forbidding discrimination has substantially increased, from 74% in 1975 to 88% in 1986.[8] This history makes it highly

[8]The figures are taken from periodic studies released by the Bureau of National Affairs, entitled *Basic Patterns in Union Contracts*. The figures *(cont.)*

unlikely that the availability of a state forum for the litigation of retaliatory discharge claims -- which are but a small portion of the kinds of complaints that may be addressed under a contract clause forbidding discharge without just cause -- will have any significant effect on the adoption or utilization of arbitration procedures by the parties to collective bargaining relationships.

By contrast, it would be difficult to overstate the adverse impact that affirmance of the decision below would have on the states' ability to exercise their power to regulate working conditions of nonunion and union employees alike. For if states may not protect their citizens against retaliatory discharges, simply because the collective bargaining agreement might provide similar protections under a just cause provision, the same argument may be made against the enforcement of state civil rights laws, state wage laws, state occupational safety laws and even state workers compensation laws. Thus, many collective bargaining agreements make provision for discrimination claims, workplace safety, and even workers-compensation related matters.[9] Sometimes contracts have

are for provisions banning discrimination based on race, color, creed, sex, national origin or age. The BNA studies also show that an increasing number of contracts, beginning with 10% in 1975, and reaching 28% in 1986, require compliance with all federal, state and local anti-discrimination laws. From 1970 to 1981, the Bureau of Labor Statistics published figures on discrimination provisions on an annual or biennial basis in its *Characteristics of Major Collective Bargaining Agreements*, BLS Bulletin Nos. 1686, 1729, 1784, 1822, 1888, 1957, 2013, 2065, and 2095. These reports also show a steady increase in provisions barring race discrimination in the years following *Gardner-Denver*, although the percentage figures are somewhat higher than the BNA studies.

[9]*See, e.g.*, Respondent's Brief in Opposition in *Willoughby v. Central Illinois Light Co.*, No. 87-417, at 13, which seems to argue that the contractual provisions for disability preempt Illinois' worker's compensation statutes altogether. *See also* Response to Petition in this case, at 6, which seems to suggest that overtime claims should be preempted because they could be arbitrated.

their own detailed rules governing these subjects, sometimes they incorporate statutory protections by reference, and sometimes the application of state law may simply be inferred from general provisions such as "just cause."

But if the Court holds that unions and employers can contract themselves out of their state law obligations, or substitute their own enforcement mechanisms and deny employees access to state court simply by adopting contract provisions that piggy-back on state law, the Court will have taken a fundamental step toward revising the historic distribution of power among the federal government, state governments, and private institutions. As the Illinois Supreme Court observed, preemption in a case like this would allow "an employer [or] a union [to] strip an employee of the protections of Illinois law by merely restating the rights and obligations that arise thereunder in a private labor agreement," which would effectively "accord the substantive provisions of a private labor agreement the supremacy of Federal law, thereby preempting State law." *Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 12, 503 N.E.2d 308, 313 (1986).

Accordingly, the fact that the state retaliatory discharge law may provide rights that in some respects resemble or parallel rights also created by a collective bargaining agreement does not make the state right dependent on the existence of a contract violation, and the right to sue in state court is not preempted by the contract's grievance and arbitration procedure.

D. The Availability of Independent State Law Remedies Should Not Be Limited As Proposed by the Lower Courts and Respondent.

Perhaps because they recognize the breath-taking scope of the preemption arguments which they advance, the lower

courts and the respondent have proposed distinctions which, they suggest, should govern the determination of whether an independent state law claim should be preempted by section 301. However, none of these proposed distinctions is tenable, and the only factors that should guide the determination of whether the state claim is preempted by section 301 is whether it is, in fact, substantially dependent on the interpretation of the collective bargaining agreement.

For example, respondent suggests that Congress did not intend to preempt all parallel state claims, but only those for which there is no current "federal or previously-existing state analogy" at the time that Taft-Hartley was enacted. Response to Petition at 7. But respondent provides no explanation for its contention that Congress wished to preserve state laws that existed in 1947, but nevertheless intended to bar the states from ever enacting any additional substantive laws governing the terms and conditions of employment. Indeed, at the time Taft-Hartley was enacted, federal law forbade the discharge of employees in retaliation for their filing a complaint or instituting a proceeding under the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), a cause of action that is closely analogous to the Illinois cause of action for discharge in retaliation for filing a claim under the state workers compensation act. Several other federal laws enacted since 1947 forbid discharge in retaliation for the exercise of rights under various federal statutes, including the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 948a, which is virtually the same as the Illinois claim which Lingle invokes. And although Illinois' workers compensation retaliatory discharge statute was not enacted until 1975, at least three states, including the neighboring states of Wisconsin and Missouri, enacted their laws against retaliatory discharge well before 1947.[10] Surely,

[10] 1941 Cal. Stat. ch. 401, at 1686, Cal. Lab. Code § 132a; 1925 Mo. Laws 395, § 37, Mo. Rev. Stat. § 287.780; 1943 Wis. Laws ch. 270, at 396-397, Wis. Stat. § 102.35(2).

Congress did not intend to preclude Illinois from following these states' example, simply because it had not done so by 1947.

The majority below also sought to limit the sweep of its ruling by suggesting that state anti-discrimination laws would not be preempted because, even though the state claim is parallel to a claim under the just cause provision of a collective bargaining agreement, Congress has "expressly stated" that state remedies may be pursued in Title VII and the Age Discrimination in Employment Act. 823 F.2d at 1046 n.17, Pet. App. 29a n.17. But the suggestion that state claims are saved from preemption only when Congress has expressly approved them stands federalism on its head, because the normal presumption is that state laws are not preempted unless Congress has made known its intention to bar them. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The exemption for anti-discrimination claims put forth by the majority has no logical basis, but rather evinces their discomfort with the implications of their preemption holding in this case.

The only proper question under section 301 is whether the state law claim is substantially dependent on a construction of the collective bargaining agreement. Because Lingle's state law claim is based solely on her employer's violation of the Illinois statute prohibiting retaliation for filing workers compensation claims, it is not preempted by section 301.[11]

[11]Two other distinctions have been developed by the Ninth Circuit that should also be laid to rest, although neither would defeat Lingle's claim in this case. First, that court has decided that state law claims may avoid preemption by section 301 if they forbid retaliation for exercising rights under state law, but not if they bar retaliation for exercising rights under federal law, on the theory that the states have little or no interest in protecting federal policies, although they do have an interest in enforcing state policies. *Compare Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984), *with Olguin v. Inspiration Consol. Copper*, 740 F.2d 1468 (9th Cir. 1984). The Ninth Circuit has also held that a state retaliatory discharge *(cont.)*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioner

December 11, 1987

claim will not be preempted if the employee acted on a correct understanding of state law, but will be preempted if it protects employees who erroneously interpreted state law, even if they did so in good faith. *Compare Paige v. Henry Kaiser Co.*, 826 F.2d 857, 863 and n.11 (9th Cir. 1987), *with DeSoto v. Yellow Freight Syst.*, 811 F.2d 1333 (9th Cir. 1987).

These distinctions lack any basis in section 301, whose preemptive effect does not depend on a balancing of state versus federal interests, as it does in certain kinds of NLRA preemption cases. *E.g., Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977). States may or may not be wise in deciding to encourage compliance with federal as well as state law, or to protect erroneous invocations of the law, but section 301 has not entrusted the federal courts with making that judgment for the states. Rather, as *Allis-Chalmers* and its progeny establish, LMRA preemption depends solely on whether the state law claim substantially depends on a construction of the collective bargaining agreement. If it does, then the state law claim is preempted, no matter how modest the state interest. Thus, a state retaliatory discharge claim cannot be preempted by section 301 simply because the state is seeking to encourage its citizens to comply with federal rather than state law, or because a state has determined that, as many federal labor laws provide, employees should be protected for taking actions erroneously, but in good faith. *E.g.*, 29 U.S.C. § 143; 49 U.S.C. § 2305(b); *NLRB v. City Disposal Syst.*, 465 U.S. 822, 837 (1984); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969).

ADDENDUM

ADDENDUM

Federal Statutes Regulating Discharge of Private Sector Employees

Statutes Forbidding Discharge in Retaliation for Employee Actions

Bankruptcy Filing:
Bankruptcy Code, 12 U.S.C. § 525(b)

Discrimination Claims or Testimony:
Civil Rights Act, 42 U.S.C. § 2000e-3(a)
Age Discrimination in Employment Act, 29 U.S.C. § 623(d)

Environmental Whistleblowing:
CERCLA, 42 U.S.C. § 9610
Clean Air Act, 42 U.S.C. § 7622
Energy Reorganization Act, 42 U.S.C. § 5851
Federal Water Pollution Control Act, 33 U.S.C. § 1367
Resource Conservation and Recovery Act, 42 U.S.C. § 6971

Jury Service:
Judicial Code, 28 U.S.C. § 1875

Labor Claims or Testimony:
National Labor Relations Act, 29 U.S.C. § 158(a)(4)

Longshore Claims or Testimony:
Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 948a

Migrant Labor Claims or Testimony:
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855

Mine Safety Reporting or Testimony:
Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)

Minimum Wage Claims or Testimony:
Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b)

Occupational Safety Reporting or Testimony:
Occupational Safety and Health Act, 29 U.S.C. § 660(c)

Pension Claims or Testimony:
Employee Retirement Income Security Act,
29 U.S.C. § 1140

Truck Safety (refusal of unsafe work):
Surface Transportation Assistance Act, 49 U.S.C. § 2305

Wage Garnishment:
Consumer Credit Protection Act, 15 U.S.C. § 1674(a)

Statutes Forbidding Discharge Based on Membership in a Class

Disability:
Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794

Race:
Civil Rights Act, 42 U.S.C. § 1981

Race, Color, Religion, Sex or National Origin:
Civil Rights Act, 42 U.S.C. § 2000e-2

Railroad or Airline Union Membership:
Railway Labor Act, 45 U.S.C.§ 152, Fourth

Union Membership:
National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3)

Vietnam Veterans:
Vietnam Era Veterans Readjustment Assistance Act,
38 U.S.C. §§ 2021(b), 2024(c)

RESPONDENT'S

BRIEF

Petitioner,

MAGIC CHEF, INC.,

Respondent.

TO THE UNITED STATES
FOR THE SEVENTH CIRCUIT

FOR RESPONDENT

CHARLES C. JACKSON*
J. STEPHEN POOR
CARL H. TERSTEGGE
CHRISTOPHER A. WEALS
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

*Counsel of Record

QUESTION PRESENTED

Whether a state court judge or legislature may encroach upon the province of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185—and the collective bargaining agreement's exclusive and mandatory grievance-arbitration procedures that Section 301 implements and protects—by creating a cause of action for wrongful discharge characterized as "independent" of the terms of the labor contract.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-259

IN THE

Supreme Court of The United States

OCTOBER TERM, 1987

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

The citations to the opinions below and the basis on which this Court's jurisdiction is invoked are set forth at page 1 of petitioner's brief.[1]

STATUTORY PROVISIONS

The following provisions of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §§ 141-87, are pertinent to this case:

Section 201, 29 U.S.C. § 171:

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation

[1]Respondent's Statement Required By Rule 28.1 appears at p. 1 of the Memorandum of the Respondent.

and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes . . . .

Section 203(d), 29 U.S.C. § 173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 204(a), 29 U.S.C. § 174(a):

(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

. . . .

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously . . . . (Footnote omitted.)

Section 301(a), 29 U.S.C. § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry

affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondent, Norge Division of Magic Chef, Inc. ("Norge"), operates a manufacturing facility in Herrin, Illinois. The production and maintenance employees at that facility, including petitioner Jonna Lingle ("Lingle"), are represented by a labor organization, Lodge No. 554 of the International Association of Machinists and Aerospace Workers ("IAM"). On December 11, 1984, Norge fired Lingle. On that same date, Lingle initiated the first of two actions, filing a grievance under the collective bargaining agreement. The grievance was processed by the IAM and Norge through the contractual grievance procedure and, following an evidentiary hearing, a duly appointed arbitrator awarded Lingle reinstatement "with full back pay" and other benefits. J.A. 25-26.

The second action taken by Lingle was the filing of a state court complaint on July 9, 1985 challenging her discharge under the Illinois common law of wrongful discharge. As relief, the complaint sought damages for "substantial and continuing financial losses in the form of lost income." J.A. 3, ¶ 7. Without objection by Lingle, R. 8, ¶ 2, Norge removed the case to the United States District Court for the Southern District of Illinois based on diversity jurisdiction. On October 19, 1985, the court dismissed the complaint as preempted by Section 301 of the LMRA. Lingle appealed and, in an *en banc* decision, the United States Court of Appeals for the Seventh Circuit affirmed.

I. The Terms And Conditions Of Petitioner's Employment

Norge and the IAM have been parties to a series of collective bargaining agreements covering all hourly production and main-

tenance employees at Norge's Herrin, Illinois facility. J.A. 5. Article 1 of the agreement that became effective May 28, 1984 recites the parties' purpose, *inter alia*, "to specify the relative rights and privileges of the Parties . . . and to establish prompt and equitable means for the settlement of grievances which may arise under the terms of this Agreement." Article 2 provides that Norge must recognize the IAM "as the sole and exclusive bargaining agency" for Lingle and other hourly employees "with respect to wages, hours and other conditions of employment." Article 3 of the agreement requires that all such employees "maintain membership in the Union as a condition of employment." J.A. 8, 9.

The Norge/IAM collective bargaining agreement establishes a variety of job classifications and hourly wages, various incentive wage systems and "cost-of-living" increases. J.A. 12, 16-19. As an IAM member, Lingle is entitled to numerous other benefits, including holiday and vacation pay, seniority protection and extensive medical and pension benefits, see R. 7, as well as protection from discharge except for "proper" or "just" cause. J.A. 14, Art. 25, 26. In exchange, the agreement also provides Norge with a variety of rights including the right to "discipline" employees, subject to the grievance procedure, for violations of Norge's work rules, which are furnished to all employees and posted on bulletin boards. *Id.* The Norge Employee Work Rules establish disciplinary penalties commensurate with the severity of specified offenses. Group III misconduct requires discharge for a first offense, and Work Rule 7 of that Group prohibits "[f]alsely stating or making claim for illness or injury." J.A. 20-23.

Article 7 establishes a grievance procedure, broadly defining the term "grievance" as "any dispute between . . . [Norge and the IAM], or between the employer and any employee, concerning the effect, interpretation, application, claim of breach or violation of this Agreement." J.A. 10. Disputes unresolved at the conclusion of the grievance procedure may be submitted to "final and

binding" arbitration before an impartial arbitrator selected under the auspices of the Federal Mediation and Conciliation Service. Article 8.5 provides that the "Grievance Procedure and Arbitration provided for herein shall constitute the sole and exclusive method of determination, decision, adjustment or settlement . . . of any and all grievances as defined herein." J.A. 10-11. "It is the intent of the Parties to this Agreement that the Grievance Procedure . . . shall serve as means for peaceful settlement of *all* disputes that may arise between them." J.A. 11 (emphasis added).[2]

II. Petitioner's Discharge And Grievance

On December 5, 1984, Lingle notified Norge that she had sustained a work-related injury. After investigating the claim, Norge concluded that Lingle's claim was fraudulent and discharged her under Norge Employee Work Rule III-7. Cert. App. 2a; J.A. 7, 25. The discharge decision was communicated to Lingle on December 11, 1984. J.A. 7.

On the same date as her discharge, Lingle, through the IAM, filed a grievance. The grievance challenged Norge's contention that Lingle "falsif[ied] a plant injury" in violation of Group Rule III-7 and requested that she be "re-instated back [sic] to work with full seniority rights and be paid for all lost pay as a result of being discharged. . . ." J.A. 7. The grievance was processed through the grievance procedure, culminating in an arbitration

[2]No provision of the grievance procedure or contract relaxes this exclusive remedy requirement for retaliatory discharge or any other kind of suit. See J.A. 15, Art. 35 "Terms of Agreement" (the collective bargaining agreement "expresses the complete and entire understanding of the Parties on the subjects of wages, hours, and other terms and conditions of employment"). Article 34.1a, the Savings Clause, provides that the remainder of the Agreement remains in full force in the event any one provision is declared unlawful. See R. 7. See also *id.* Art. 5 (prohibiting discrimination for the exercise of certain federal statutory rights and prohibiting conduct in violation of such statutes).

hearing before Arbitrator Peter Maniscalco on June 26, 1986. Arbitrator Maniscalco upheld the grievance and ordered that Lingle be "reinstated with full back pay, all seniority rights and be made full, from the date of discharge to the date of reinstatement." J.A. 25; Cert. App. 38a n.21. After discussions regarding the effect of the award, Norge, Lingle and the IAM signed a "settlement agreement" acknowledging Norge's "compliance" with the award. In the parties' words, Norge has:

> 1. Returned [Lingle] to an employed status at their plant in Herrin, Illinois;
>
> 2. Restored all of the employee's seniority rights and benefits;
>
> 3. Paid to the employee all back wages for which she is entitled, to wit: $10,563.37;
>
> 4. Otherwise complied with all directions of the arbitrator's decision and award.

J.A. 25-26. Had Norge refused to process Lingle's grievance through the arbitration procedure, or to comply with the arbitrator's award, Article 24 of the collective bargaining agreement would have released the IAM to strike. J.A. 13.

III. Petitioner's Purported State Law Suit And The Decisions Below

During the pendency of her grievance, Lingle filed a complaint in Illinois state court. The complaint alleged that Norge discharged Lingle on December 11, 1984 "solely because of [her] exercise of her rights and remedies" under the Illinois Workers' Compensation Act and that such discharge was "contrary to public policy of the State of Illinois." The complaint, like her grievance, sought to recover damages "in the form of lost income." J.A. 3. Lingle nowhere asserts, however, that any provision of the labor contract is unlawful under Illinois law.

On August 21, 1985, Norge removed the case to the United States District Court for the Southern District of Illinois on the basis of diversity jurisdiction. Cert. App. 3; R. 8, ¶ 2. The district court granted Norge's motion to dismiss on October 9, 1985. Relying on this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), the district court concluded that the claim asserted by Lingle was "inextricably intertwined" with the provisions of the labor contract between Norge and Lingle's bargaining agent, the IAM. The district court also reasoned that "[a]llowing an independent tort action for retaliatory discharge would undermine the mutually agreed upon procedures provided for in the Norge-IAM labor agreement," which establish "the exclusive procedure for resolving disputes between the parties," citing *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Cert. App. 50a-51a. Because Lingle had not yet exhausted her exclusive contractual remedies, one of the prerequisites to suit under Section 301, the district court dismissed the complaint. *Id.*

In an *en banc* decision, the court of appeals affirmed.[3] The Seventh Circuit first addressed the development of the Illinois tort of retaliatory discharge for filing workers' compensation claims. This species of wrongful discharge "tort" was created by Illinois courts to protect "at-will employees who, the [Illinois Supreme] [C]ourt felt, were otherwise subject to an employer's absolute power to terminate." Cert. App. 6a (citing *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978)).[4] Thereafter, the Illinois Supreme Court in *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985), and *Gonzalez* v. *Prestress Engineering Corp.*,

[3]The case was consolidated with *Martin* v. *Carling Breweries, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3416 (U.S. Nov. 20, 1987) (No. 87-859), for purposes of *en banc* argument.

[4]Although the Illinois public policy against firing employees for filing workers' compensation claims has its basis in statutory law (Pet. Br. 2), the cause of action for retaliatory discharge is judicially created. *Kelsay*, 384 N.E.2d at 358-59; Cert. App. 6a-7a.

115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 107 S. Ct. 3248 (1987), extended the tort to employees covered by a collective bargaining agreement so that such employees could seek to recover punitive damages. Cert. App. 7a.

The Seventh Circuit then turned its attention to whether Congress intended Lingle's claim to be preempted by Section 301. Following this Court's decision in *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. 95, 103 (1962), the court of appeals started from the premise that the " 'dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute.' " Cert. App. 21a. The court of appeals reasoned that these "substantive principles" require that " 'the preemptive effect of § 301 must extend beyond suits alleging contract violations.' " Cert. App. 22a (quoting *Allis-Chalmers*, 471 U.S. at 210-11). Federal labor law " 'require[s] that 'the relationships created by [a collective bargaining] agreement' [be] defined by application of an evolving federal common law grounded in national labor policy.' " *Id.*

The Seventh Circuit acknowledged that *Allis-Chalmers* did not provide general authorization for parties to a collective bargaining agreement " 'to contract for what is illegal under state law,' " and that Section 301 would not preempt certain rights " 'independent of a labor contract.' " Cert. App. 23a n.13. But in rejecting petitioner's argument that the tort of retaliatory discharge, as formulated by Illinois courts, is "independent" and does not require an interpretation of the collective bargaining agreement, the Seventh Circuit observed that:

> [T]his reasoning is inverted; the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge. It is the scope of the contract that must be analyzed initially. To conclude otherwise, by analyzing the state tort first, would allow the states, through the guise of the worker's compensation laws, to circumvent the arbitration and grievance procedures envisioned by Congress as exclusive.
>
> If the tort of retaliatory discharge were not preempted by § 301, then workers covered by collective bargaining agreements would be able to bring their claims in the state courts. However, a state court would be deciding precisely the same issue as would an arbitrator: whether there was "just cause" to discharge the worker. . . . Therefore, the state tort of retaliatory discharge is inextricably intertwined with the collective bargaining agreements here, because it implicates the same analysis of the facts as would an inquiry under the just cause provisions of the agreements.

Cert. App. 28a-29a (citations and footnote omitted). Accordingly, the court of appeals held that "although federal law does not preempt all state law claims involving a provision of a collective bargaining agreement, where a plaintiff makes a claim for wrongful discharge, this claim necessarily implicates a just cause provision" and is "therefore preempted." Cert. App. 36.

SUMMARY OF ARGUMENT

The fundamental purpose of the Labor Management Relations Act is to effectuate the goals of national labor policy by promoting the negotiation and enforcement of collective bargaining agreements. As stated explicitly in the statute and reiterated in numerous decisions of this Court, this federal labor law envisions a uniform regime of contract in which employers and labor unions jointly establish the terms and conditions of employment and the methods for resolving all employment disputes that may arise. The Court now has before it a question left open in its recent decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 217 n.11 (1985), *Caterpillar Inc.* v. *Williams*, 107 S. Ct. 2425, 2433 & n.13 (1987) and *International Brotherhood of Electrical Workers* v. *Hechler*, 107 S. Ct. 2161, 2163, 2169 n.5 (1987) — whether LMRA Section 301 preempts state wrongful discharge claims because those claims are not "sufficiently independent"

of the labor contract and conflict with the overriding policies and purposes of federal law.[5] Petitioner and her amici argue for a limitless exception to Section 301 preemption. Petitioner asserts that all "positive law" rights created by state legislatures or judges—and defined by state law as "independent" of the collective bargaining agreement—are necessarily beyond the reach of Section 301 whenever the state-law cause of action does not "mention any rights under the collective bargaining agreement" (Br. 19). The Seventh Circuit correctly rejected this effort to rewrite thirty years of federal labor policy.

In *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957), this Court held that Congress, through LMRA Section 301, authorized federal courts to create a body of federal common law relating to collective bargaining agreements "which the courts must fashion from the policy of our national labor laws." As further explained in *Allis-Chalmers*, 471 U.S. at 209, the Court in *Lincoln Mills* "understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts"; it would therefore be "inverted," Cert. App. 28a, to assess a claim such as Lingle's according to the requirements of state law. The vitality of Lingle's claim must first be evaluated under the policies that inform and define the parameters of Section 301. Two of the most central of these policies—complete preemption and the exclusivity (and finality) of contractual grievance procedures—foreclose Lingle's wrongful discharge claim.

Section 301 embraces a broad preemption rule that requires the determination of all rights and obligations relating to the col-

[5] Contrary to petitioner's argument (Br. 9), this Court in *Allis-Chalmers* did not decide the question but reserved it: "We pass no judgment on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances." 471 U.S. at 217 n.11.

lective bargaining agreement to be one of federal, not state, law. For twenty-five years, this Court has repeatedly "singled out" Section 301 as a uniquely broad source of federal common law with a " 'preemptive force . . . so powerful as to displace entirely any state cause of action' " within its scope. *Metropolitan Life Ins. Co.* v. *Taylor*, 107 S. Ct. 1542, 1546 (1987) (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962). To effectuate Section 301's purposes, "the preemptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers*, 471 U.S. at 210; see also *Hechler*, 107 S. Ct. at 2165-66. Cf. *International Bhd. of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1958).

Section 301 preemption enforces the exclusivity doctrine announced in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965). LMRA Sections 201, 203(d) and 204(a), 29 U.S.C. §§ 171, 173(d) & 174(a), expressly and specifically declare the congressional policy that parties to labor contracts should provide private dispute resolution procedures for the "final adjustment of grievances"—exactly what Norge and the IAM have done here—as a means to avoid work stoppages and other industrial strife. In furtherance of this policy, the Court has established a comprehensive set of rules that command a broad deference to these contractual grievance procedures, requiring that "all doubts" be resolved in favor of arbitration of labor disputes and carefully circumscribing judicial intervention into such disputes. Contrary to the unacceptable state-law balkanization of employment rights proposed by petitioner, this exclusivity rule authorized Norge and the IAM—and countless other employers and unions relying on the rule—to agree to a grievance procedure that not only provided petitioner full back pay but also foreclosed all other avenues of relief.

Under these rules, Lingle's wrongful discharge claim must be considered "intertwined" with the contract, *Allis-Chalmers*, 471

U.S. at 213, and in no event "sufficiently independent" to avoid preemption, *Hechler*, 107 S. Ct. at 2163. Lingle is challenging her discharge from employment, an issue explicitly covered by the contract and traditionally resolved through contractual grievance procedures. In fact, she submitted the identical claim to arbitration and prevailed, receiving "all back wages for which she is entitled" together with reinstatement. J.A. 26. Cf. *Caterpillar*, 107 S. Ct. at 2433 n.15 (nonarbitrable grievance not necessarily preempted by Section 301). Lingle now seeks to relitigate the same facts under state-law theories, claiming that she should receive greater benefits than those provided by the contract. A straightforward application of the doctrines of preemption and exclusivity of contract remedies would preclude this effort. The only remaining inquiry is whether there is a reason to create an exception to these rules to allow Lingle's particular wrongful discharge claim to proceed. No such reason exists.

Petitioner and her amici urge that her wrongful discharge claim is "inalienable" because it is a "positive law" creation of the Illinois courts, "independent" of the Norge/IAM labor contract in the sense that the basis of liability is Illinois law rather than the contract. Respondent agrees that this Court in *Allis-Chalmers* stated that "it would be inconsistent with congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 471 U.S. at 212. But the inquiry neither begins nor ends with a simple search for a state "positive law" enactment or rule of decision that can provide relief without reference to the collective bargaining agreement.

Such a limitless "test" proves too much. It ignores the threshold federal policies of preemption and exclusivity. It would authorize states to define the content of Section 301 and to gerrymander the scope of contractual grievance procedures by creating judicial causes of action and supplemental remedies for even the most routine of disputes now thought to be "grist in the mills of the arbitrators." *United Steelworkers of Am.* v. *Warrior &*

Gulf Navigation Co., 363 U.S. 574, 584 (1960). Nor is Lingle's claim presaged by this Court's decisions allowing other federal claims to coexist with Section 301 rights or by decisions in the minimum standards cases balancing general National Labor Relations Act policies against otherwise permissible areas of state regulation. In sum, there is no basis in this Court's decisions or the policies of Section 301 to create an exception in this case to the broad preemptive scope of Section 301 and the exclusivity principle built into the expectations of every signatory to a labor contract. The judgment of the court of appeals should, accordingly, be affirmed.

ARGUMENT

I. The Federal Common Law Fashioned Under Section 301 Mandates A Uniform, Consistent Approach To Issues Relating To Collective Bargaining Agreements That Forecloses State Encroachment Through The Wrongful Discharge Claim Raised By Petitioner

A. The federal labor laws, through Section 301, envision a "system of industrial self-government," *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 594, 580 (1960), in which employers and labor unions jointly establish the terms and conditions of employment and the methods for resolving all disputes that may arise. See LMRA §§ 201, 203(d) & 204(a), 29 U.S.C. §§ 171, 173(d) & 174(a). Section 301 analysis does not begin with a grudging notion of its reach and the usual deference to state law rules of decision or legislation. It is not merely a jurisdictional grant to hear contract claims. Rather, with respect to disputes arguably implicating labor agreements, Congress authorized the courts, through Section 301, to create a body of federal common law "which courts must fashion from the policy of our national labor laws." *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957). The Court in *Lincoln Mills* "understood § 301 as a congressional *mandate* to

the federal courts to fashion a body of *federal* common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 209 (1985) (emphasis added).

Petitioner, however, starts from the sweeping premise that "[s]tates should be entitled to conclude . . . that the public policies which led them to create workers' compensation programs, and to protect employees against retaliation for invoking their rights under it, will not be adequately served by requiring organized employees to seek vindication through their unions in the arbitration process" (Br. 23). The difficulty petitioner foresees is that the judgment of the court of appeals fails to pay appropriate "respect due to the states in our federal system" (Br. 10). Petitioner also contends that because certain federal laws apply to the employment relationship, it is "highly unlikely that Congress intended to deny states the right to regulate . . . terms and conditions of employment not specifically preempted by federal legislation" (Br. 14). Whatever the merit of petitioner's arguments concerning federal-state regulations generally, they are fundamentally flawed as applied to Section 301.

By focusing on what state law requires—indeed elevating it to an equal footing with federal labor law—petitioner begins her analysis backwards. Whether Lingle states a claim "independent" of the labor contract—or whether her claim actually "arises out of" that contract—is strictly a question of federal, not state, law. *Allis-Chalmers*, 471 U.S. at 209; Cert. App. 28a-29a. State labor rules and laws stand "side-by-side" (Pet. Br. 8) with federal rules only to the extent the federal common law of Section 301 permits.

B. The first precept of federal common law undercutting Lingle's claim is the complete preemption doctrine of Section 301. Under this doctrine, the point of departure is whether the state law interferes with the federal scheme established in the LMRA;

if so, the state *must* be precluded from acting. *Allis-Chalmers*, 471 U.S. at 209; *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), the Court concluded that, when interpreting labor contracts, federal labor policies require that state laws be preempted in favor of federal law because "the subject matter of § 301(a) 'is pecularly one that calls for uniform law' ":

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Id. at 103, 104 (citations omitted). In subsequent decisions, the Court has made clear that the "preemptive force of § 301 is so powerful as to displace entirely any state cause of action . . . . [Accordingly,] any complaint that comes within the scope of the federal cause of action," even though pled as a state claim and seeking "a remedy available *only* under state law," is nevertheless "purely a creature of federal law" and is to be treated as a Section 301 claim. *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983) (emphasis in original). See also *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968). Section 301 preemption, unlike other areas of federal labor law, thus does not depend on a "balancing" of respective federal and state interests. *Allis-Chalmers*, 471 U.S. at 213 n.9. Rather, any state claim falling within Section 301's scope, regardless of how pled or the

remedy sought," is preempted. For "20 years, this Court has singled out claims pre-empted by § 301 . . . for such special treatment." *Metropolitan Life Insurance Co.* v. *Taylor*, 107 S. Ct. 1542, 1546 (1987).[1]

[1] The availability of punitive damages under Illinois law does not determine the preemptive effect of Section 301 on Lingle's claim. In *Operating Engineers* v. *Jones*, 460 U.S. 669, 684 (1983), for example, the Court summarily dismissed the availability of punitive damages as sufficient to avoid NLRA preemption. Similarly, seeking a remedy available "*only* under state law" has never defeated Section 301 jurisdiction. *Franchise Tax Bd.*, 463 U.S. at 23 (emphasis in original). See also *Caterpillar Inc.* v. *Williams*, 107 S. Ct. 2425, 2429 n.4 (1987); *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. at 561.

Even under the balancing analysis utilized in cases addressing preemption under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69, see *infra* pp. 34-38, a strong argument could be made that Lingle's wrongful discharge claim is preempted.

It is by no means clear that Lingle's wrongful discharge claim is outside the protective scope of NLRA Section 7, 29 U.S.C. § 157, and hence preempted by that statute. See *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980) (discharge allegedly in retaliation for threatening to file workers' compensation claim involves employee conduct that is protected, concerted activity under NLRA). Compare *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 833 n.10 (1984) ("an employer [may] commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employees' concerted activities") and *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975) (individual who files safety complaint with state agency engages in protected, concerted activity) and *G.V.R. Inc.*, 201 N.L.R.B. 147 (1973) (same) with *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984) (overruling *Alleluia Cushion*) ("*Meyers I*") and *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118 (1987) ("*Meyers II*") and *Prill* v. *NLRB*, No. 86-1675 (D.C. Cir. Dec. 31, 1987) (LEXIS, Genfed library, USApp file) (affirming *Meyers II*). See also *Meyers I*, 268 N.L.R.B. at 499 (dissenting opinion).

Petitioner's argument (Br. 11) that Norge's appellate brief "expressly disclaim[ed]" reliance on NLRA preemption as a basis for upholding the district court's decision is overstated. In the district court, Norge argued that the general principles of the NLRA and Section 301 authority preempted Lingle's claim, R. 7, and in the court of appeals Norge defended the district court's judgment based on Section 301.

It is correct, as the court of appeals recognized, Cert. App. 23a, that the scope of Section 301's complete preemption is not without limit. In *Allis-Chalmers*, the Court held preempted a plaintiff's state-law tort claim that challenged the employer's alleged bad-faith processing of certain benefits provided by a collective agreement even though such conduct was not specifically prohibited by the contract. 471 U.S. at 215 ("The assumption that the labor contract creates no implied rights is not one that state law may make."). In language oft-repeated by petitioner here, the Court qualified its holding: "In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 471 U.S. at 212. But *Allis-Chalmers* affords little insight on what rights are "independent" of the labor agreement and expressly reserved judgment on whether a claim based on an "independent, nonnegotiable, state-imposed duty" and not raising problems of "contract interpretation . . . would be pre-empted under similar circumstances." *Id.* at 217 n.11. In *International Brotherhood of Electrical Workers* v. *Hechler*, 107 S. Ct. 2161, 2167 (1987), however, the Court's language suggested that certain claims, though superficially independent, might not be "sufficiently" independent of the labor contract to withstand preemption. Under either analysis—the "sufficiently independent" approach of *Hechler* or the question specifically reserved in *Allis-Chalmers*—Lingle's wrongful discharge claim is preempted.

1. Under general Section 301 principles and the specific facts of this case, Lingle's claim is not "sufficiently independent" of the labor contract to survive. Section 301 principles deem the Norge/IAM collective bargaining agreement to be more than a contract addressing specified transactions. Rather, it constitutes a "generalized code" between Norge and the IAM regulating the "whole employment *relationship*." *Warrior & Gulf*, 363 U.S. at 578-79

(emphasis added); see also *Ailis-Chalmers*, 471 U.S. at 211; *Bowen* v. *United States Postal Serv.*, 459 U.S. 212, 224-25 (1983); Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959). Consistent with this reality, "[i]f the policies that animate 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers*, 471 U.S. at 210.

In all events, however, Lingle's claim *does* allege a contract violation, although it is different from *Allis-Chalmers* in the sense that the source of the alleged right of recovery is an Illinois rule of decision. All parties agree that Lingle's discharge was unquestionably grievable under the terms of the labor contract, for she immediately filed a grievance that the IAM pursued to "final and binding" arbitration. J.A. 10-11. This grievance procedure is not limited to literal contract violations, but extends to applications of Norge's work rules and "*all* [other] disputes that may arise between [the parties]." J.A. 11, Art. 8.4 (emphasis added); see also J.A. 14, 20, 23. An arbitrator selected through the Federal Mediation and Conciliation Service ordered Norge to reinstate Lingle with "full back pay" and other benefits. Norge, all agree, fully complied with the arbitrator's orders, J.A. 26, and, had it not, the IAM would have been released to strike, *id.* at 13.

Although petitioner's brief now claims that Illinois law could award her "other damages in addition to back pay, such as for emotional distress, as well as punitive damages, which were not sought and could not have been awarded by the arbitrator" (Br. 4), the relief sought in her complaint is confined to "losses in the form of lost income." J.A. 3, ¶ 7. Cf. *Hechler*, 107 S. Ct. 2168-69 n.5 (declining to rule on claim not raised below). With respect to this "lost income," Lingle now says that Norge's payment of "all back wages for which she is entitled" (J.A. 26) was not "fully compensatory" because Article 26.2 of the parties' contract provides that back pay for incentive employees is to be paid at downtime rather than incentive rates. Lingle also asserts that the arbitrator assigned her to a job less "desirable" than the one she

previously held (Pet. Br. 4 & n.1, 24). Lingle thus seeks to cure, under Illinois law, alleged inadequacies of the labor contract relief provided by the arbitrator. This task is impossible, as petitioner's brief demonstrates, *id.*, unless the Illinois courts construe the IAM/Norge agreement.

But even if Lingle's complaint had sought damages unavailable under the contract, see *supra* note 6, her wrongful discharge action would not be sufficiently distant from the labor agreement to avoid Section 301 preemption. Questions relating to the relationships created by a collective bargaining agreement, the meaning of the agreement, and "what legal consequences [are] intended to flow from breaches of that agreement," *Allis-Chalmers*, 471 U.S. at 211, are necessarily federal questions under Section 301 and may not be predetermined by state courts or legislatures. The fact that Lingle has chosen to base her wrongful discharge claim on Illinois law cannot determine whether that claim is independent of the labor contract for Section 301 purposes. It is clear that the employment right Lingle seeks to enforce is specifically protected by the Norge-IAM contract and that her wrongful discharge claim is a "dispute" within the meaning of the contract's grievance-arbitration provisions. Resolution of this arbitrable claim thus requires recourse to the parties' agreement to determine what "legal consequences" were intended to flow from its breach, including the possible preclusion of extracontractual forums and remedies. The issue is not the *source* of the right but the right itself. Regardless of whether it is framed in state-law terms, a suit to enforce a right that exists under a collective bargaining agreement—in this case, protection from wrongful discharge—necessarily implicates the terms of that agreement and the parties' expectations concerning remedies. Such a claim is not "sufficiently independent" to fall outside the agreement's scope.[8]

[8]This would be true even if Lingle had failed to follow contractual grievance procedures and simply sued in state court. The scope of the collective bargaining agreement cannot depend on whether a plaintiff resorts to it in the first instance.

2. Even if Lingle's claim were predicated on an "independent, nonnegotiable, state-imposed duty," the Court should answer the question reserved in *Allis-Chalmers*, 471 U.S. at 212 n.11, by holding that the particular wrongful discharge claim raised by Lingle is preempted. In this regard, petitioner is simply wrong when she argues that "the Court has never done what respondent asks it to do in this case, *i.e.*, hold that a state's substantive regulation of the terms and conditions of employment, which operates independently of the terms of the union contract, is supplanted by the law of the collective bargaining agreement" (Br. 12). Less than two years after *Lincoln Mills*, the Court in *International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959), invalidated an Ohio statute invoked by a union member to proscribe a wage arrangement contained in a collective bargaining agreement. The *Oliver* analysis is directly applicable to Lingle's claim.

The Court observed that, in *Lincoln Mills*, "Congress has provided for a system of federal law applicable to the agreement the parties made in response to [the duty to bargain]." *Id.* at 296. Although this observation was preceded by a discussion of the duty to bargain under NLRA Sections 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1) & (5), and the Court did not specifically cite to Section 301, its reliance on *Lincoln Mills* and the context of its opinion show that its holding was based squarely on the congressional policy that Section 301 must preempt certain independent state-law duties. The *Oliver* Court assessed the intent of Congress and held in unmistakable language that:

> [T]here is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress.

358 U.S. 296-97 (citations omitted); see also *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981) (applying ERISA and *Oliver* to invalidate a provision of the New Jersey workers' compensation law banning pension benefit offsets "[w]here, as here, the pension plans emerge from collective bargaining . . . . As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law"); *Malone* v. *White Motor Corp.*, 435 U.S. at 512-13 (pre-ERISA state regulation of pension plans permissible where, under *Oliver*, Congress intended states could regulate); *California* v. *Taylor*, 353 U.S. 553, 561 (1957) (collective bargaining agreement authorized by Railway Labor Act invalidates conflicting provisions of state civil service laws). Cf. *Perry* v. *Thomas*, 107 S. Ct. 2520 (1987) (arbitration agreement enforced through Federal Arbitration Act preempts California law authorizing suit to collect wages).[9]

[9] *Oliver* thus established a broad preemption rule that has been consistently recognized as protecting the parties' bargain and precluding, *inter alia*, state-law remedies that conflict with federal policy. See, e.g., *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 635 (1975); *Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 264 (1974); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960).

Given these holdings, petitioner's reliance on *Pan American World Airways, Inc.* v. *Puchert*, 472 U.S. 1001 (1985), *dismissing appeal from Puchert* v. *Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), is misplaced. Neither the Hawaii Supreme Court nor the Jurisdictional Statement, 1983 October Term, No. 83-1952, raised these holdings and this Court had no opportunity to consider their application. The Hawaii Supreme Court also applied an NLRA balancing analysis to find that a wrongful discharge claim was not preempted by the Railway Labor Act, 677 P.2d at 455, even though it is "irrelevant" to preemption analysis

(Footnote continued on following page)

The *Oliver* holding answers the question reserved in *Allis-Chalmers* and directly precludes Lingle's wrongful discharge claim. Even if "independent" in the sense that the liability alleged is founded on a state rule of decision, Lingle's claim is preempted because it encroaches into an area—the settlement of disputes under the labor contract—that Congress, in Section 301, reserved to the parties to this labor contract.[10] Both *Allis-Chalmers* and *Oliver* recognize the parties' essential federal right to decide how such disputes, including wrongful discharge, will be resolved and what remedies will be available. Here, the parties have bargained for exclusive contractual remedies through arbitration. Lingle can no more sidestep these procedures through a state rule of decision providing a wrongful discharge cause of action than could Norge avoid its duty to arbitrate by relying on a state-court decision holding that filing a fraudulent workers' compensation claim precludes relief.

C. Section 301's broad preemption policy enforces the exclusivity doctrine announced in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). This doctrine and its policies have their genesis in LMRA Sections 201, 203(d) and 204(a), 29 U.S.C. §§ 171, 173(d) & 174(a), where Congress explicitly declared the national policy that employers and representatives of employees should endeavor to avoid industrial strife by resolving their differences through collective bargaining and/or through "such methods as may be provided for in any applicable [collective

(Footnote continued from previous page)
involving Section 301. *Allis-Chalmers*, 471 U.S. at 213-14 n.9. The dismissal of *Puchert* for want of a substantial federal question is therefore entitled to no deference here. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[10]The issue here is whether Section 301 precludes supplemental state-law relief for conduct that *both* state law and the contract prohibit. It is therefore unnecessary, contrary to petitioner's abstract suggestion (Br. 26), to decide the effect of a contract *violating* state law. In such a case, however, preemption might still be required under the rule of *Oliver* and its progeny. See *infra* pp. 31-32.

bargaining] agreement." 29 U.S.C. § 171(b). See J.A. 13, Art. 24 (any refusal by Norge to arbitrate releases the IAM to strike). "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes . . . ." 29 U.S.C. § 173(d).

In *Republic Steel*, the exclusivity rule and its policies were described in the following terms:

> As a general rule in cases to which federal law applies, federal policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements."

379 U.S. 652-53 (emphasis in original) (quoting *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. at 103); accord *Andrews* v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1972) (holding that wrongful discharge claim made without prior resort to contractual grievance procedures mandated by Railway Labor Act is preempted). The exclusivity rule "complements the union's status as exclusive bargaining representative[11] by permitting it to

[11]See generally 29 U.S.C. § 159(a); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (the policy of exclusive representation "therefore extinguishes the individual employee's power to order his

(Footnote continued on following page)

participate actively [as here] in the continuing administration of the contract." *Republic Steel*, 379 U.S. at 653; see also *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962) ("[i]ndividual claims lie at the heart of the grievance and arbitration machinery [and] are to a large degree inevitably intertwined with union interests"). The rule also serves the undeniable interests of employers in "limiting the choice of remedies available to aggrieved employees." *Republic Steel*, 379 U.S. at 653; see also Cert. App. 28a-29a.

While on its facts *Republic Steel* dealt with an action literally seeking to utilize a state-law theory to enforce contract rights rather than one, as here, where a plaintiff invokes a purportedly "independent" basis to obtain damages measured by the contract, in this type of wrongful discharge action the federal policies behind the exclusivity doctrine are equally, if not more, important. When employers agree to arbitration to limit the remedies against them, they certainly have no intention (and unions no expectation) that the exclusivity principle will be subject to the skill of state-court judges and legislatures to conceive causes of action characterized as "independent" of the labor contract. This conclusion is particularly compelling given *Teamsters* v. *Oliver*'s recognition that "independent" state laws must be preempted if within Section 301's scope, *Alessi*, 451 U.S. at 525; *Taylor*, 353

(Footnote continued from previous page)
own relationships with his employer and creates a power vested in the chosen representative to act in the interests of all employees"). Under the exclusive representation principle, Norge was obliged to deal solely with the IAM concerning Lingle's terms and conditions of employment, and any failure to do so, such as refusing to proceed to arbitration on Lingle's claim, would constitute an unfair labor practice. See 29 U.S.C. § 158(a)(5). Exclusive representation and the concomitant principle of majority rule secure for all unit members of collective strength and bargaining power with "full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 62 (1975). Majority rule is therefore "[c]entral to the policy of fostering collective bargaining." *Id.* at 62.

U.S. at 561, and this Court has not understood the exclusivity principle to be confined to claims literally based on the contract in any event. See *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 359 (1971) (Harlan, J., concurring) (exclusivity doctrine of *Republic Steel* may supersede certain independent federal statutory rights, but not those under federal Seaman's Wage Act); *id.* at 373, 375 (White, Brennan, Stewart and Marshall, JJ., dissenting) (where the "collective agreement reveals that the parties intended all disputes and grievances, not merely those based on the contract, to be resolved if possible through the grievance procedure," *Republic Steel's* exclusivity rule should foreclose suit based on Seaman's Wage Act).[12]

This application of the exclusivity doctrine to bar Lingle's claim harmonizes the federal policies articulated in *Republic Steel* with those of preemption to ensure that the "central role of arbitration," *Allis-Chalmers*, 417 U.S. 219, is not undermined. In words that have equal force as to Lingle's claim, the *Allis-Chalmers* Court wrote:

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*. The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is preempted, their federal right to decide who is to resolve contract disputes will be lost.

[12] Accord *Roman* v. *United States Postal Serv.*, 821 F.2d 382, 386 (7th Cir. 1987) (due process claim for wrongful discharge preempted by exclusive contract remedies and policies of Section 301); *Sanders* v. *Washington Metro. Area Transit Auth.*, 819 F.2d 1151, 1156-58 (D.C. Cir. 1987) (negligent termination claims must be processed through mandatory grievance procedures); *National Treasury Employees Union* v. *Kurtz*, 636 F.2d 411, 415 (D.C. Cir. 1980) (alleged violation of IRS regulation subject to grievance procedure).

> . . . Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract.

Id. at 219-20 (citations omitted; emphasis added).[13]

"Preserving the effectiveness of arbitration" has, since *Lincoln Mills*, been a central concern of this Court. "The parties [do] not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity . . . to be familiar with the plant and its problems." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 108 S. Ct. 364, 374 (1987). Accordingly, all disputes even "arguably" within the reach of the grievance procedure must be submitted to the arbitrator. *AT&T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649-50 (1986); *Warrior & Gulf*, 363 U.S. at 582 (disputes are grievable unless it can be said with "positive assurance" they are not); see also *United Steelworkers of Am.* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960) ("means chosen by the parties for settlement of their differences . . . [must] be given full play"). Courts are prohibited from reviewing the merits of an arbitration award and, so long as the award "draws its essence from the collective bargaining agreement," it is legitimate. *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). " '*This is especially true when* [as here] *it comes to formulating remedies.*' " *United Paperworkers* v. *Misco, Inc.*, 108 S. Ct. at 372 (emphasis in original) (quoting *Enterprise Wheel*, 363 U.S. at

[13]For these reasons, respondent believes the AFL-CIO is supporting the wrong party before this Court. See *Republic Steel*, 379 U.S. 653 ("employer and union [should not be deprived] of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances"). See also Symposium, *When State and Federal Laws Collide: Preemption—Nightmare or Opportunity?*, 9 Indus. Rel. L.J. 4, 22, 24 (1987) (argument by union counsel that state wrongful discharge causes of action will cause employer and union to ask " 'Why have arbitration?' . . . an employer's going to say to the union 'why should I agree to it?' ").

597).[14] The integrity of the arbitration process is policed by releasing employees from the duty to arbitrate and the finality of arbitration decisions whenever the union engages in arbitrary conduct by refusing to process a grievance or undermines the arbitration proceeding. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).[15]

---

[14]It is by no means clear that a state-law action would be more beneficial to Lingle than arbitration. Cf. Cert. App. 28a-29a. In arbitration, Lingle obtained reinstatement; this remedy is not available under Illinois wrongful discharge law. In the Illinois courts, Lingle would always have the burden of proof on her claim, *Bell* v. *School District No. 84*, 407 Ill. 406, 95 N.E.2d 496, 501 (1950); *General Foods Corp.* v. *Hall*, 39 Ill. App. 3d 147, 349 N.E.2d 573, 576 (1976), while in arbitration Norge had the obligation, not met here, of proving a rule violation by "clear and convincing" evidence or evidence establishing guilt "beyond a reasonable doubt." See *Armco Steel Corp.*, 48 Lab. Arb. (BNA) 132 (Cahn, 1967); *Proto Tool Co.*, 46 Lab. Arb. (BNA) 486 (Roberts, 1966); *American Smelting & Ref. Co.*, 7 Lab. Arb. (BNA) 147 (Wagner, 1947).

In state court, moreover, Lingle's claim would fail if Norge demonstrated she fraudulently filed a workers' compensation claim, *Wayne* v. *Exxon Coal USA, Inc.*, 157 Ill. App. 3d 514, 510 N.E.2d 468, 471 (1987), whereas in arbitration Lingle could still prevail, even were such a demonstration made, if Norge had failed to gather its evidence for discharge in accordance with industrial due process. See Edwards, *Due Process Considerations in Labor Arbitration*, 25 Arb. J. 141 (1970). It should also be noted that, under the National Labor Relations Act, the parties have obligations to provide requested information concerning a grievance, thus providing a form of discovery in arbitration proceedings. *NLRB* v. *Acme Indus. Co.*, 385 U.S. 432, 438 (1967). Finally, although unusual, an award of compensatory or punitive damages may be within the authority of the arbitrator. *United Paperworkers* v. *Misco, Inc.*, 108 S. Ct. at 372. See, e.g., *Mallinckrodt Chem. Works*, 50 Lab. Arb. (BNA) 933, 935-40 (Goldberg, 1968); *Five Star Hardware & Elec. Corp.*, 44 Lab. Arb. (BNA) 944, 946 (Wolff, 1965). See also Symposium, supra note 13, at 25.

[15]The federal interest in encouraging private dispute resolution is so powerful that, in appropriate circumstances, intra-union remedies must also be exhausted prior to suit. *Clayton* v. *International Union, UAW*, 451 U.S. 679 (1981).

On behalf of Lingle and all other employees, the IAM and Norge agreed that their grievance procedure "shall serve as means for peaceful settlement of *all* disputes that may arise between them," that the procedure was "the sole and exclusive method" for resolving grievances, and that it was "final and binding." J.A. 10-11 (emphasis added). Cf. *Caterpillar Inc.* v. *Williams*, 107 S. Ct. at 2431 n.10 & 2433 n.15 (nonarbitrable claims of former management employees not necessarily preempted by Section 301). Because petitioner's wrongful discharge claim is a dispute arising under the terms of an agreement made between parties in a labor contract, *Allis-Chalmers*, 471 U.S. at 220, it is necessarily governed by the exclusivity rule of Section 301 and preempted. Having bargained for the exclusive remedy of arbitration, Lingle cannot set aside that bargain by using state law to seek further relief.

II. Petitioner's "Positive Law" Exception To Section 301 Principles Is Unworkable And Finds No Support In This Court's Decisions Construing Federal Statutory Law And "Minimum Labor Standards" Questions

Despite Section 301's complete preemption and exclusivity requirements, petitioner and her amici argue that her purported wrongful discharge claim is independent of the labor contract because it is available to all employees in Illinois regardless of the existence of a collective bargaining agreement. This argument has several premises. First, petitioner asserts that this Court's decisions construing federal statutory law demonstrate a congressional intent that all state-law causes of action similarly remain intact. Petitioner also argues that this Court's "minimum labor standards" decisions balancing the competing interests of the National Labor Relations Act and certain state laws support a ruling of no preemption. Finally, petitioner argues that the importance of the state interests she asserts supports such a ruling. Therefore, according to petitioner, the

state tort is an independent creature of "inalienable, positive law" and is not preempted. Pet. Br. 19-23; AFL-CIO Br. 3-4.[16] Petitioner's proposed exception to Section 301 principles is both unworkable and its premises unsupported by the decisions of this Court.

A. This Court could, if it chose, engraft petitioner's "positive law" exception onto the "evolving federal common law grounded in national labor policy." *Bowen* v. *United States Postal Serv.*, 459 U.S. at 225. Such a result would be contrary, however, to the policies of Section 301 preemption and exclusivity, and would upset the expectations of countless employers, unions and employees based on these policies. Petitioner's proposed exception is unworkable because the necessary victims of her unlimited positive law rule would be the very Section 301 policies from which the exception was carved.

By invoking positive law, the various states would effectively be granted the unbridled power to regulate the collective bargaining relationship by enacting laws or issuing rules of decision that recognize "independent" torts or other obligations required of all employers. The inevitable consequence of this approach would be that the authority for establishing the terms and conditions of employment would be transferred from the parties and delivered, piecemeal, to the legislatures of fifty states and/or their judiciaries. This authority would permit states to gerrymander Section 301's substantive content, and avoid its preemptive force, whenever they see fit to create "independent" laws and rights which purportedly can be litigated without reference to the collective bargaining agreement. Such a limitless exception would eviscerate the policies behind arbitration and the collective bargaining agreement, and nullify—on a state-by-state basis—the

[16] To say that a law is "inalienable," however, is to say no more than it is required by a state. This simply cannot answer the federal question of whether a particular state intrusion is justified.

private "system of industrial self-government" envisioned by Congress and this Court's decisions. *Warrior & Gulf*, 363 U.S. at 580.[17]

Under petitioner's exception, there would be nothing to foreclose a state from promulgating rules to govern the most routine of situations now considered "grist in the mills of the arbitrators." *Id.* at 584. A state could prescribe the number of employee absences necessary before discharge would be appropriate, the conditions under which incentive pay systems could be used, general work rules for all employees, or any other matter. Contra *California* v. *Taylor*, 353 U.S. at 561 (invalidating state civil service code as applied to employees covered by collective bargaining agreement).[18] Because the source of these rights was not the labor

[17]Whatever the wisdom of providing proliferating causes of action to workers employed at will, Illinois decisional law demonstrates that petitioner's "positive law" exception will swallow the exclusivity rule. See *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (tort of retaliatory discharge extends to complaints of mishandling radioactive materials); *Palmateer* v. *International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (recognizing cause of action for whistle blowing); *Brazinski* v. *Transport Serv. Co.*, 159 Ill. App. 3d 1061, 513 N.E.2d 76 (1987) (tort applies to alleged retaliation for filing wage claim); *Johnson* v. *World Color Press, Inc.*, 147 Ill. App. 3d 746, 498 N.E.2d 575 (1986) (upholding claims for retaliatory discharge based on federal securities acts); *Petrik* v. *Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (tort of retaliatory discharge properly brought by employee allegedly fired for reporting financial mismanagement by company).

[18]For example, the State of Montana has enacted a state-wide prohibition of discharges except for just cause, Wrongful Discharge from Employment Act, 1987 Mont. Laws, *reprinted in* Indiv. Empl. Rts. Manual (BNA) 567:4 (effective July 1, 1987). California has a similar bill pending, S.B. 427, 1987 Reg. Leg. Sess. (introduced Feb. 17, 1987). Were these laws written without exclusions for collective bargaining agreements, there would be nothing under petitioner's "positive law" exception to prevent such "independent" causes of action. See *Strachan* v. *Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (unless state-law claims challenging issues normally subject to grievance procedures are

(footnote continued on next page)

contract but "independent" state law, parallel avenues for relief would exist, denigrating free collective bargaining and causing "arbitration to lose most of its effectiveness." *Allis-Chalmers*, 471 U.S. at 220. Were such an approach adopted, "all the evils addressed in *Lucas Flour* would recur." *Id.* at 211.[19]

This is not to say, as the court of appeals recognized, Cert. App. 23a, that a collective bargaining agreement or an arbitrator's decision automatically provides immunity to the parties from all state or federal laws. See AFL-CIO Br. 20-23. Wholly apart from the hypothetical notion that a union would risk a breach of duty of fair representation suit by agreeing to contract terms unlawful under state law, an issue *not* presented here, a "court may not enforce a collective-bargaining agreement that is contrary to public policy . . . [but] the question of public policy is ultimately one for resolution by the courts." *W.R. Grace & Co.* v. *Local 759, International Union of Rubber Workers*, 461 U.S. 757, (1983); see also *United Paperworkers* v. *Misco, Inc.*, 108 S. Ct. at 373 ("a court may refuse to enforce a collective-bargaining agreement

preempted, the most mundane disciplinary disputes would be transformed into state court lawsuits, thereby destroying the "critically important" function of grievance-arbitration). Cf. Act of Sept. 10, 1987 No. 85-300, 1987 Ill. Leg. Serv. 384 (West) (requiring collective bargaining agreements to include provisions making them binding on successor employers).

[19]Union interests, it has been argued, also would not be served by transferring increased authority to the states:

> If left to an amalgam of conflicting state staututory and common law, union legal expenses and entanglements will necessarily increase. Instead of a consistent, preemptive national system of laws (with, admittedly, some regional variations resulting from conflicting decisions by the federal courts of appeal), there will be fifty different systems of labor law, hobbling, for instance, national and industry-wide bargaining—if there is any—with endless complexity. Union legal costs will also rise because lawyers will become more, not less, necessary.

Gold, *The Capricious Lure of Labor Law Regulation*, 89 W. Va. L. Rev. 883, 888 (1987).

when the specific terms contained in that agreement violate public policy"). Whether the parties have agreed to anything improper, or whether the arbitrator has not properly respected the interests of the states, is a "case-by-case" inquiry for the federal courts to make based on developing federal common law under Section 301. *Allis-Chalmers*, 471 U.S. at 220.

The point therefore remains: the inquiry is not for the states but for the federal courts applying the principles of Section 301—although "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Lincoln Mills*, 353 U.S. at 457. Petitioner's exception should be rejected because the states do not have the authority to repeal Section 301 preemption policies through positive law enactments, *Teamsters* v. *Oliver*, 358 U.S. 296-97, and because it would necessarily "stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith* v. *Evening News Ass'n*, 371 U.S. at 200.

B. Petitioner's reliance on such cases as *Atchison, Topeka & Santa Fe Railway Co.* v. *Buell*, 107 S. Ct. 1410 (1987), *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), is in error. In each of these cases, the Court "declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under *federal* statutes." *Buell*, 107 S. Ct. at 1415 (emphasis added). Cf. *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. at 358, 366 (concurring and dissenting opinions). Thus, in *Buell*, an employee subject to the mandatory grievance-arbitration procedures of the Railway Labor Act retained the right to pursue personal injury claims authorized by the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. In *Barrentine*, similarly, employees to whom arbitration was available could nevertheless pursue the "minimum substantive guarantees" embodied in the Fair Labor Standards Act

(FLSA), 29 U.S.C. §§ 201-19, by filing a federal action authorized by that statute. And with respect to title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, applicable by its terms to employers and unions alike, the Court held in *Gardner-Denver* that employees could not be foreclosed by a prior arbitration ruling from seeking a judicial remedy despite the fact that the arbitrator's award might be afforded "great weight." 415 U.S. at 48 n.6, 58 n.20, 59 n.21; Cert. App. 29a.

The analysis of these cases thus stands on a level different from the assessment of Lingle's *state-law* claim. The existence of certain federal laws that intrude upon the collective bargaining agreement is not necessarily an expression that state law also may intrude. When deciding that federal statutes must be given full effect despite the presence of grievance-arbitration, this Court has simply enforced the congressional judgment that intrusions into free collective bargaining are permissible in specified areas of federal concern. This question of overlapping federal statutory schemes is simply one of statutory interpretation.[20]

The issue of preemption, in contrast, is controlled by the supremacy clause, U.S. Const. art. VI, cl. 2, and the mandates of Section 301. Compare *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (holding that New York pregnancy discrimination law, though not incompatible with title VII, was preempted to the extent purported state regulation encroached in areas of exclusive federal concern under ERISA) with *Perry* v. *Thomas*, 107 S. Ct. at 2526 (coexistence of federal statutory rights with arbitration agreement authorized by Federal Arbitration Act not inconsistent with preemption of state law by arbitration agreement). Unlike the plaintiffs in *Buell*, *Barrentine* and *Gardner-Denver*, Lingle's claim has no basis in federal statutory law—or in state law

[20]The other federal statutes cited by petitioner may be evaluated in precisely this way, with appropriate case-by-case consideration to the issues raised in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. at 358, 366 (concurring and dissenting opinions).

sanctioned by federal law—and hence no congressional intent to permit the intrusion she proposes can be discerned. Cf. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963) (Colorado law not preempted because Railway Labor Act "has never been used . . . [to place a duty on carriers] to engage only in fair nondiscriminatory hiring practices").

C. This Court's decisions in the "minimum labor standards" cases also provide no support for petitioner's exception. In *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), at issue was a Massachusetts law mandating minimum health care benefits for inclusion in general insurance policies. A pair of insurance carriers challenged the statute on grounds that it was preempted by the general policies of the NLRA.[21] The Court delineated the "two distinct NLRA pre-emption principles" it had previously recognized. The first, which was not at issue, has its genesis in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959), and protects the primary jurisdiction of the National Labor Relations Board (NLRB) to adjudicate unfair labor practices by balancing the interests of the NLRB against those embodied in state law. 471 U.S. at 724-25.

The second type of NLRA preemption, urged by the insurance carriers, was so-called *Machinists* preemption, which balances the state's interest in regulating a field that Congress intended to be left unregulated—the collective bargaining "process for determining terms and conditions of employment"—with the degree of interference posed to the federal scheme. *International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976). The Court held in *Metropolitan Life* that

[21]The carriers also contended the law was preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. With regard to this claim, the Court concluded that the state enactment fell within ERISA's preemption provisions but was, nevertheless, valid because it also fell within ERISA's insurance savings clause, which explicitly preserves such state laws. 471 U.S. 732.

the state minimum labor standards at issue "neither encourage[d] nor discourage[d] the collective bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established by the Act." 471 U.S. at 755. Minimum state labor standards "affecting union and nonunion employees equally" were therefore not preempted under the *Machinists* rule:

> Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. See, e.g., *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737, 739 (1981). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

471 U.S. at 755 (emphasis in original). The NLRA's legislative history simply did not demonstrate that "Congress intended to disturb the myriad state laws then in existence that set minimum labor standards." *Id.* at 756; see also *Fort Halifax Packing Co.* v. *Coyne* 107 S. Ct. 2211, 2223 (1987) ("[t]he fact that the parties are free to devise their own severance pay arrangements . . . strengthens the case that the statute works no intrusion on collective bargaining").

For several reasons, the *Metropolitan Life* holding is inapplicable in this case. First, in petitioner's words, unlike "NLRA preemption cases," Section 301's "preemptive effect does not depend on a balancing of state versus federal interests" (Br. 33 n.11), and indeed such balancing is "irrelevant." *Allis-Chalmers*, 471 U.S. at 213 n.9. Rather, if a state regulation intrudes into the sphere deemed covered by Section 301, it is preempted—

regardless of the strength or weakness of the state's interest. *International Bhd. of Teamsters* v. *Oliver*, 358 U.S. at 296-97.

Second, the focus of the Court's inquiry in *Metropolitan Life* was whether the state regulation conflicted with the purposes and policies of the NLRA.[22] Reading that statute as intended to protect employee rights to bargain collectively for better wages and working conditions, the Court found no inconsistency between that purpose and the minimum employment standards that the Massachusetts law provided. 471 U.S. at 757 ("when a state law

[22]Amicus National Conference relies heavily on certain legislative history which purportedly shows an intent to shield from preemption all state actions implicating workers' compensation statutes. Nat. Conf. Br. 11-14. For example, the Conference claims that a 1972 Report on State Workmen's Compensation Laws and the subsequent refusal of Congress to enact a federal workers' compensation statute was based on the "tradition of state control." The argument that this legislative history supports a retraction of the scope of Section 301, as applied to Lingle's wrongful discharge claim, distorts this legislative history.

The actual conclusion of the Report referenced by the Conference is that the states be given time to correct deficiencies in the *benefits* provided by their programs and, if "federal support is needed to guarantee compliance with these essential recommendations, they should be included as mandates in federal legislation." *Report of the National Commission on State Workmen's Compensation Laws* 26 (July 1972). Moreover, the reluctance to recommend an immediate federal benefit program was based as much on the belief that federal administration standards would be no better than the states as on a concern for "states rights." *Id.* at 126. The same sentiment runs through the subsequent congressional debate on a national workers' compensation law. The remainder of the statement of Senator Hatch quoted by the Conference (Br. 12 n.12) is that "the federal government's own direct experience on compensation programs has not been a star-studded performance." *National Workers' Compensation Standards Act of 1979: Hearings on S. 420 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 53 (1980). This sentiment was echoed by other speakers referenced by the Conference. *Id.* at 78 (statement of William Movhovsky); *National Workers' Compensation Standards Act, 1974: Hearings on S. 2008, S. 1029, S. 1772 & S. 2587 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 2272-74 (1974) (remarks of Richard Schubert).

establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act"). The Court thus had no occasion to consider the situation presented here, where the state-law rule *directly conflicts* with federal policies expressly set forth in the language of the statute. See LMRA Sections 201, 203(d) & 204(a). These provisions reveal the broad purposes of the LMRA and mandate that it be construed as prohibiting state regulation that contravenes those purposes. Allowance of Lingle's claim would, unlike the claim in *Metropolitan Life*, directly interfere with the congressional policy that the parties' grievance-arbitration procedure be exclusive, final and binding.

Finally, Lingle's wrongful discharge tort, dealing with employment rights, is not the type of traditional "minimum labor standard" envisioned by *Metropolitan Life*. Historically, workers' compensation laws provide health benefits for work-related injuries, not employment rights. The "right to file a workers' compensation claim is not altered or compromised by the federal preemption of the tort action." *Clark* v. *Momence Packing Co.*, 637 F. Supp. 16, 19 (C.D. Ill. 1985), *aff'd without opin.*, 828 F.2d 22 (7th Cir 1987). The Illinois rule of decision on which petitioner relies imposes no minimum benefits on the collective bargaining agreement. Instead, it operates to provide an alternate remedy for "wrongful discharge" disputes normally processed under the contract.

It cannot be seriously argued that such a duplicative remedy, or anything remotely resembling it, existed at the passage of the LMRA, a factor the Court found persuasive in upholding the state regulation at issue in *Metropolitan Life*, 471 U.S. at 723.[23]

[23]See AFL-CIO Br. 5 (wrongful discharge tort is a "recent" creation). Petitioner argues that in three states—California, Missouri and Wisconsin—this tort existed as of 1947 (Br. 31). The statutes cited, however, did not provide for civil wrongful discharge suits. In fact, in

(Footnote continued on following page)

In all events, the language of the LMRA and this Court's decisions under Section 301 indicate that, to the extent such a state wrongful discharge remedy may have existed in 1947, Congress intended that it be foreclosed by contractual grievance-arbitration procedures. Nor is there any evidence in the legislative history of the LMRA or any subsequent federal enactment of a congressional intent to permit states to intrude upon those exclusive grievance procedures by fashioning concurrent state remedies for discharge-related disputes. Cf. *Oliver,* 358 U.S. at 296-97 (preemption of inconsistent state law required unless affirmatively demonstrated that Congress intended to leave area of regulation to states); *Malone,* 435 U.S. at 506-13 (positive evidence in legislative history of Federal Disclosure Act that Congress wished to permit states to have a role in regulating pension plans).[24]

(Footnote continued from previous page)

Missouri, the statute does not provide an employee with a cause of action. *Christy* v. *Petrus,* 365 Mo. 1187, 295 S.W.2d 122, 126 (1956). Wisconsin law, moreover, specifically makes reference to a collective bargaining agreement as a defense to a retaliatory discharge claim. Finally, not a single reported case was brought under either California or Wisconsin's statutes until each was rewritten in 1972 and 1977, respectively.

The first cases creating a workers' compensation retaliatory discharge cause of action were *Frampton* v. *Central Indiana Gas Co.,* 260 Ind. 249, 297 N.E.2d 425 (1973) and *Sventko* v. *Kroger Co.,* 69 Mich. App. 644, 245 N.W.2d 151 (1976). The Illinois Supreme Court, when first creating this tort, recognized the novelty of its holding in reversing the award of punitive damages:

> [T]he cause of action asserted here was novel and there was no statutory or judicial pronouncement which would have caused the defendant to believe that its conduct was actionable while there was authority which would reasonably cause one to believe that it was not.

Kelsay v. *Motorola, Inc.,* 384 N.E.2d at 361.

[24]Petitioner also claims that Congress' intent to allow her wrongful discharge action to proceed is evidenced by the bar to removal of state workers' compensation claims. 28 U.S.C. § 1445(c) (Br. 15 n.4). Al-

(footnote continued on next page)

D. Petitioner, finally, argues that preemption of her wrongful discharge claim would "cripple" Illinois' ability to protect its workers' compensation system from "abuse" (Br. 23). This claim is not only bad history, see *infra* note 23, but given the complete relief petitioner received and the inherent protections of the arbitration process, see *supra* note 14, nothing could be further

though in this Court petitioner expressly disavows any challenge to the propriety of removal, Cert. Pet. 6 n.2, one of her amici claims that Section 1445(c) barred the removal of this case and that the Seventh Circuit's decision should be reversed on this ground. National Conference Br. at 5 n.5. This argument errs in a variety of respects.

First, where, as here, diversity jurisdiction otherwise exists and Lingle agreed to jurisdiction, never sought remand and judgment was entered, "the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction." *Grubbs* v. *General Elec. Credit Corp.,* 405 U.S. 699, 702 (1972). See R. 4 (complaint); R. 8, ¶ 2 (agreement that jurisdiction proper here).

Second, Lingle does not assert a workers' compensation claim but a wrongful discharge tort that may not even be handled by the Illinois Industrial Commission. *Garrison* v. *Industrial Comm'n,* 83 Ill. 2d 375, 415 N.E.2d 352 (1980). The fact that Lingle has chosen a workers' compensation statute as expressing the alleged public policy involved does not transform this case into something it is not.

Third, as noted by the Seventh Circuit, "the meaning of 'workmen's compensation laws' in § 1445(c) is a matter of federal law, regardless of the label a state may give the action." Cert. App. 12a-15a. As found by the Seventh Circuit and amply demonstrated herein, Lingle's claim is a claim under Section 301—a claim to which Section 1445(c) does not apply.

Fourth, the arguments advanced by both petitioner and her amici rest on a misunderstanding of Section 1445(c)'s legislative history. Section 1445(c) was intended to apply only to laws providing for expeditious resolution of benefit claims brought by injured employees, something not at issue in Lingle's case. Moreover, the concern of the statute was not the preservation of states rights but the congestion of federal courts with claims that had no relationship to federal law. Sen. Rep. No. 1830, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3099, 3104-06. Finally, this Court has recognized that Section 1445(c) does not affect the removal and preemption of cases found to fall with Section 301. *Alessi,* 451 U.S. at 525.

from the truth. "Employees in the United States who are protected by arbitration under collective agreements probably have more complete and sensitive security against unjust discipline, more effective procedures, and more effective remedies than employees in any other country in the world." Summers, *Protecting All Employees Against Unjust Dismissal*, Harv. Bus. Rev., Jan.-Feb. 1980, at 132, 133.

But the short answer to petitioner's concerns over the interest of the State of Illinois—again, as petitioner herself recognizes—is that the state's interest is "irrelevant" because this is a Section 301 complete preemption, not an NLRA balancing, case. *Allis-Chalmers*, 471 U.S. at 213 n.9; Pet. Br. 33 n.11. Another answer is that the collective bargaining agreement's just cause provisions provide full protection from alleged "abuse" by employers. Illinois, and virtually every other state now affording a wrongful discharge cause of action for filing a workers' compensation claim, only recently created the cause of action asserted by Lingle. Although some jurisdictions have now either judicially or legislatively extended this type of wrongful discharge tort to employees covered by a collective bargaining agreement, when the tort was originally conceived in the 1970s by Illinois, it was only to protect otherwise unprotected employees.[25] Other jurisdictions

[25]In *Kelsay*, the court's holding was premised on the otherwise unfettered right of the employer to terminate a plaintiff. The court was concerned with the "abuse" of an "employer's otherwise absolute power to terminate an employee at will." 353 N.E.2d at 357. Following *Kelsay*, in fact, at will employment was considered one of the elements of the tort. "There are two elements to a claim for retaliatory discharge: at-will employment and acts that violate public policy." *Darnell* v. *Impact Industries, Inc.*, 119 Ill. App. 3d 763, 766, 457 N.E.2d 125, 127 (1983), *aff'd*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). Accord *Petrik* v. *Monarch Printing Corp.*, 444 N.E.2d at 590. The tort was not extended to unionized employees by the Illinois Supreme Court until 1984. *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985).

justify the tort on the same basis[26] for, as this Court has recognized, "[a] single employee [is] helpless in dealing with [his] employer" and "[u]nion was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Trades Council*, 257 U.S. 184, 209 (1921). Still other jurisdictions, by statute or otherwise, restrict the ability of employees covered by collective bargaining agreements to bring retaliatory discharge claims based on filing workers' compensation claims.[27]

[26]E.g., *Frampton* v. *Central Indiana Gas Co.*, 297 N.E.2d at 478 (a "remediless" employee needs such protection); *Armstrong* v. *Goldblatt Tool Co.*, No. 59,464 (Kan. Dec. 11, 1987) (LEXIS, Kan library) (no tort action for retaliatory discharge where employee is adequately protected by collective bargaining agreement); *Clanton* v. *Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984) (recognizing retaliatory discharge cause of action for "at-will" employees).

Courts have offered a similar justification for other types of retaliatory discharge torts. See, e.g., *Wagenseller* v. *Scottsdale Mem. Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985) (recognizing the need for some exceptions to "at-will" employment); *Adler* v. *American Standard Corp.*, 290 Md. 615, 432 A.2d 464, 470 (1981) ("[A] majority of American workers do not have the job security provided by collective bargaining agreements . . . . [A]n at will employee's interest in job security . . . is deserving of recognition."); *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (wrongful discharge exception judicially created to protect employees not covered by collective bargaining agreements); *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 386-87 (1980) (wrongful discharge recognized to protect at-will employees not afforded the substantial protection of "just cause" limitations); *Ambroz* v. *Cornhusker Square, Ltd.*, 226 Neb. 899 (1987) (recognizing need for some exceptions for abusive discharge of "at-will" employees); *Monge* v. *Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (recognizing need for exceptions to at-will employment); *Sides* v. *Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818 (1985) (wrongful discharge recognized to protect non-contract employees from employer abuses); *Phillips* v. *Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36, 57-58 (1986) ("wrongful discharge . . . judicially created to protect otherwise unprotected employees;" since employees under a collective bargaining agreement have equivalent or greater protection, tort should not be extended to such individuals).

[27]E.g., Haw. Rev. Stat. § 378-32(2) (1985); Mass. Gen. Laws Ann. ch. 152, § 75B(2) (West Supp. 1987); *Schuyler* v. *Metropolitan Transit Comm'n*, 374 N.W.2d 453, 446 (Minn. App. 1985); *Brinkman* v. *State*, 729 P.2d 1301, 1308 (Mont. 1986). See also *Johnson* v. *Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986).

This demonstrates not only that an exception to Section 301 is unnecessary to protect the workings of state workers' compensation laws from alleged "abuse" for employees like petitioner, but also that wrongful discharge claims are not properly grouped with traditional health laws which, so long as the purposes of Section 301 are not thwarted, survive federal preemption. Compare *Oliver*, 358 U.S. at 297 (distinguishing local health regulations) with *Alessi*, 451 U.S. at 525-26 (preempting New Jersey workers' compensation law to the extent inconsistent with terms of collective bargaining agreement).

The allowance of a state wrongful discharge cause of action in this case would completely undermine central principles of national labor policy. It would "invert" the established rule that federal law is paramount. It would subordinate Section 301's complete preemption doctrine to the vagaries of any positive law legislation or rule of decision of the states. It would eviscerate the exclusivity doctrine, upset the expectations of the parties to collective bargaining agreements, and deprive those parties of their federally-protected right to limit remedies for employment disputes. The Seventh Circuit properly perceived this threat and correctly found Lingle's wrongful discharge claim to be preempted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

P. MICHAEL KIMMEL
GILBERT, KIMMEL,
HUFFMAN & PROSSER
102 Orchard Drive
Carbondale, Illinois 62903
(618) 457-3547

EDWARD H. GRAHAM
MAYTAG CORPORATION
403 West 4th Street, North
Newton, Iowa 50208
(515) 791-8893

CHARLES C. JACKSON*
J. STEPHEN POOR
CARL H. TRIESHMANN
CHRISTOPHER A. WEALS
SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Respondent

January 23, 1988

**Counsel of Record*

REPLY

BRIEF

No. 87-259

In the

Supreme Court of the United States

October Term, 1987

No. 87-259

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

February 22, 1988

CASILLAS PRESS INC. · 1000 CONNECTICUT AVE., N.W., WASHINGTON, D.C. 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

Other Authorities:

Page

In the

Supreme Court of the United States

October Term, 1987

No. 87-259

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

The court of appeals accepted the argument advanced by respondent below and held that the Illinois cause of action for retaliatory discharge for filing a workers compensation claim is preempted by section 301 of the Labor-Management Relations Act ("LMRA"). It did so because it believed that petitioner's claim could not be resolved without interpreting the collective bargaining agreement. Perhaps the most remarkable aspect of respondent's brief is that it makes no serious effort to defend that rationale.

To be sure, respondent pays lip service to the language of *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), on which the lower courts relied, by stating from time to time that the state claim is "intertwined" with or "dependent on" the agree-

ment between the union and the employer. But respondent uses those words in a highly artificial sense to include state claims that can be resolved without any actual reference to the agreement, but which either are parallel to claims or defenses that could be made based on that agreement, or are barred by the agreement. Resp. Br. at 18-19. Parallel state law claims, in respondent's view, are not independent of the collective bargaining agreement because the union is said to have the power to waive the state law rights, or in respondent's words, to sign an agreement that "foreclosed all other avenues of relief." *Id.* at 11-12. To support this claim of "parallel preemption," respondent and its *amici* rely on *Teamsters v. Oliver*, 358 U.S. 283 (1959), for the proposition that state laws that regulate the same subjects about which a union and employer have a duty to bargain under the National Labor Relations Act ("NLRA") are pre-empted by the agreement that is the fruit of that bargaining.

In this reply, we first show why *Teamsters v. Oliver* does not provide any support for preemption of the state law in this case. Second, we respond to the attempt by the *amicus* Chamber of Commerce to defend the decision below on its own terms, and we show that Lingle's claim does not depend on her collective bargaining agreement. Third, we demonstrate that respondent's attempt to distinguish the line of cases beginning with *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), on the ground that they involve federal laws and this case involves state law, is a distinction without a difference. Finally, we explain why the state cause of action for retaliatory discharge does not threaten the national labor policy favoring arbitration of disputes about the administration of collective bargaining agreements.

1. STATE LAWS SETTING MINIMUM STANDARDS FOR EMPLOYMENT CONDITIONS ARE NOT PREEMPTED.

The centerpiece of respondent's argument is the claim that the federal labor laws encourage the creation of a "system of industrial self-government" that supersedes state regulation of the terms and conditions of employment, Resp. Br. at 20-22, 24, 29-30, and that the states retain the power to regulate specific kinds of working conditions only insofar as Congress has given them permission to do so. *Id.* at 33-34, 37-38. Its principal authority for that proposition is *Teamsters v. Oliver*, 358 U.S. 283 (1959). However, not only do *Oliver* and the other cases cited by repondent not support preemption of state regulation of substantive terms and conditions of employment, but this Court has repeatedly rejected the view urged by respondents, *e.g.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 451 U.S. 724 (1985), and it should not reopen that long-settled question.

In *Oliver*, the Teamsters Union had agreed with trucking employers that, when they chose to conduct their business by leasing trucks from "owner-operators" who then drove those trucks, the leases would contain certain minimum standards. An owner-operator then sued a Teamster local and two employers to prohibit them from putting this agreement into effect, on the theory that such agreement was forbidden by the Ohio antitrust laws. This Court first decided that, because of the relationship between the lease terms and the labor portion of the owner-operator's costs, and the danger that substandard lease terms might have the effect of undercutting the union's attempt to bargain for higher wages, the lease terms were themselves a mandatory subject of bargaining. But Ohio had sought to apply its antitrust laws, which require all individuals to bargain separately, to the labor market, thus for-

bidding the union and the employer from negotiating about or entering into any agreement that standardized terms to govern the very matters about which federal labor law commanded them to bargain and to try to reach an agreement. Because the state's approach was inconsistent with the federal policy encouraging such agreements, it was preempted by the NLRA.

The differences between this case and *Oliver* are apparent. First, *Oliver* is an NLRA preemption case, and the preemption found here by the court of appeals, and the only basis on which respondent relied below, was based solely on section 301 of the LMRA, 29 U.S.C. § 185. Although respondent contends, Br. at 16 n.7, that petitioner "overstated" its disclaimer below of reliance on NLRA preemption, its brief in the court of appeals objected to one of petitioner's arguments because it allegedly pertained only to the NLRA, and "this case is not an NLRA preemption question." Norge Ct. App. Br. at 17, a copy of which has been lodged with the Clerk.

Second, even if this were an NLRA case, Ohio did not purport to fix the minimum terms of truck drivers' employment or of owner-operators' leases, such as by setting the rates to be paid by the employers. Rather, the state's error was that it attempted to apply its antitrust laws, *id.* at 295, whose purpose is antithetical to the very notion of collective bargaining. Thus, in several subsequent cases, the Court has described the issue in *Oliver* as whether state antitrust laws could be applied to a mandatory subject of bargaining, not whether general state employee protection laws remain applicable. *E.g., Fibreboard Corp. v. NLRB*, 379 U.S. 203, 212 (1964); *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971); *Malone v. White Motor Corp.*, 435 U.S. 497, 512 (1978). Indeed, the *Oliver* Court contrasted the antitrust statute at stake there, which "adjust[ed] relationships in the world of commerce," with local health or safety laws, which would not be preempted. 358 U.S. at 297. There is no indication that the Court intended health and safety laws to be the only example of non-preempted minimum standards; rather, they were offered solely as an example of substantive regulations of employment conditions, like Illinois' rule against retaliatory discharge, that may coexist with the system of collective bargaining.

Similarly in *California v. Taylor*, 353 U.S. 553 (1957), also cited by respondent, the state had subjected employees of a state-owned railroad to its own civil service system, which forbade them to join unions, strike, or engage in collective bargaining. The National Railroad Adjustment Board ("NRAB") refused to act on certain grievance claims on the theory that it lacked jurisdiction over state-owned railroads, but this Court held that Congress had intended to apply the Railway Labor Act ("RLA") to all railroads, whether in private or public ownership, that no state could countermand this Congressional decision, and hence that the NRAB had jurisdiction. Although the Court noted in passing that "the terms of the collective-bargaining agreement . . . would take precedence over conflicting provisions of the state civil service laws," *id.* at 561, the principal thrust of the Court's opinion was directed not to the substantive regulation of the state's civil service laws, but rather to the claim that the entire system of collective bargaining that had been authorized by Congress was barred by the state's authority.[1]

[1]Respondent also cites a passage in *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 526 (1981), that, under ERISA, pension terms that emerge from collective bargaining "themselves become expressions of federal law, requiring pre-emption of intrusive state law." But ERISA's preemption provision is a substantive one that explicitly bars any state regulation of pensions, 29 U.S.C. § 1144, unlike other labor laws which leave most substan-

(footnote continued)

Indeed, the Court has consistently rejected "th[e] argument that a State's establishment of minimum substantive labor standards undercuts collective bargaining," *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2222 (1987), or that collective bargaining agreements are expressions of federal law that oust substantive regulation of employment conditions by the states. As Justice Jackson explained in the earliest case on this subject, *Terminal RR Ass'n v. Brotherhood of RR Trainmen*, 318 U.S. 1, 6-7 (1943):

> The Railway Labor Act, like the National Labor Relations Act, does not undertake government regulation of wages, hours, or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. . . . State laws have long regulated a great variety of conditions in transportation and industry . . .. We suppose that employees might consider that state or municipal requirements . . . were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves . . ..

tive regulation of the terms and conditions of employment to the states. By contrast, the Court in *Allis-Chalmers* expressly rejected a similar argument under section 301, finding that "[t]here is no indication that Congress intended to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." 471 U.S. at 212.

The Court has consistently followed this basic rule in subsequent cases under the RLA, NLRA, and LMRA, notwithstanding *California v. Taylor* and *Teamsters v. Oliver*, and despite the existence of collective bargaining agreements in which the parties had addressed themselves to the terms and conditions of employment. *E.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978). Moreover, on at least two occasions, the Court has dismissed for want of a substantial federal question appeals from state court decisions that upheld state statutes against attack on the very grounds repeated here by respondent and its *amici*.[2] And in *Metropolitan Life Ins. Co. v. Massachusetts*, 451 U.S. 724, 753-758 (1985), the Court squarely rejected an argument that the NLRA preempts state minimum employment standards which pertain to the subject of a collective bargaining agreement, that was based on the same dicta in *Oliver* and *Alessi* that respondent cites here. *Id.* at 752-753. As Court stated in *Metropolitan Life*, that argument would stand the Wagner Act on its head. *Id.* at 756.

Perhaps because they recognize that their argument sweeps too broadly to be accepted, respondent and its *amici* point to a number of factors about petitioner's claim that they say make it particularly appropriate for preemption. The difficulty is that none of these distinctions matters if their reading of *Oliver* is accepted. Thus, it would not matter whether the state cause of action was expressly created by a state legislature or by judges through common law development. Nor would it mat-

[2] *Utility Trailer Sales v. Machinists District 190*, 464 U.S. 1005 (1983) (appeal based on *Teamsters v. Oliver* and *Alessi v. Raybestos-Manhattan); Baltimore & Ohio RR Co. v. Pennsylvania Dep't of Labor & Industry*, 423 U.S. 806 (1975) (appeal based on *California v. Taylor*). *See also Industrial Welfare Comm. v. Superior Court*, 27 Cal.3d 690 (1980), *app. dism. and cert. denied*, 449 U.S. 1029 (1980)(state may regulate wages, hours and other conditions despite inconsistent provisions in collective bargaining agreements).

ter whether the plaintiff had attempted to exhaust her remedies under the collective bargaining agreement before filing suit, or whether she won or lost at the arbitration if she went that route first. Similarly, the result would be the same whether the remedies under state law were better, worse, or equal to those available under the agreement. And there would still be substantive preemption whether or not the collective bargaining agreement explicitly covered the subject of the state regulation, because even if there were no express language, as long as the state law related to a subject about which the parties could have reached an explicit agreement, but did not, all state claims would be preempted under respondent's approach.

The only relevant question under respondent's view would be whether the matter was a mandatory subject of bargaining. Because virtually every aspect of employment that states might wish to regulate — such as health and safety, wages and hours, disability provisions, legal holidays, parental leave, leave for jury duty and for other civic obligations, and discrimination — is a mandatory subject under 29 U.S.C. §158(d), all state laws on these subjects would be preempted.[3]

Respondent concedes that state laws would not be preempted if they regulated subjects that Congress has expressly "sanctioned." Resp. Br. at 34. *See also id.* at 21, 38; EEAC Br. at 18-19. But this approach stands on its head the normal rule that Congress is presumed *not* to intend preempt state law, and that preemption may be found only where the evidence is clear that Congress intended to preempt. Pet'r

[3]Although the court below believed that an exception would be made for state civil rights laws, 823 F.2d at 1047 n.17, the *amicus* Equal Employment Advisory Council ("EEAC"), which defends employer interests in civil rights cases, obviously does not agree, inasmuch as its participation as an *amicus* can only be explained by its belief that state equal employment laws would also be preempted by affirmance of the decision below.

Br. at 10, 25. Respondent and its *amici* seek to evade this presumption by repeatedly insisting that section 301 has a broad and powerful preemptive force, and that petitioners are seeking an "exception" to that preemption in this case or to "gerrymander" the scope of section 301. However, that argument simply begs the question, because it assumes that section 301's preemption extends beyond the interpretation and application of collective bargaining agreements to include all claims that may be made about the terms and conditions of employment.

Respondent also invokes sections 203(d) and 204(a) of the LMRA, 29 U.S.C. §§ 173(d) and 174(a), to show Congressional intent to preempt state law. Resp. Br. at 11, 13, 22, 23. But it never responds to the observation in our opening brief, at 28, that the language of these provisions does not apply to arbitration of state law claims, but only relates to "grievance disputes arising over the interpretation or application of an existing collective bargaining agreement" and "dispute[s] over the terms or application of a collective bargaining agreement."

Respondent suggests that the states' interest in employee protection is adequately served by the rule developed under section 301 that a collective bargaining agreement, or an arbitral decision under that agreement, will not be enforced where it violates public policy. Br. at 31-32. But petitioner and the states can take little solace in this limited exception, for several reasons. First, if state laws have been preempted, it is highly unlikely that the courts will find in them a sufficiently strong public policy to overturn an arbitration. Second, as respondent concedes, Br. at 32, the applicability of a public policy exception is a question of federal law, and under section 301 and the doctrine of complete preemption, the employer can insist that the question be decided by the federal courts. Thus,

whatever protection the public policy exception may provide for *employees*, it provides no protection whatsoever for the interest of the *states* in effectuating their own public policies.

Third, and perhaps most important, even if the public policy limitation prevented unions and employers from enforcing collectively-bargained provisions that explicitly fly in the face of substantive state statutes, it would not satisfy state concerns that the grievance-arbitration procedure, under the exclusive control of the union and employer, may not provide adequate procedural protection for state interests in protecting employees. *See* Pet'r Br. at 23-26. For example, it is sensible to say that, when the union's bargaining is the source of the employee's employment condition, as are collectively-bargained rules, the agreement that creates those rights can establish the exclusive procedure for enforcing them. Similarly, it also makes sense for the union to be able to decide in which individual cases those rights should be enforced and to agree to limit the remedies for violating them. But when it is the state that is the source of the rights, the ultimate impact of giving enforcement power to the union, and allowing the union and the employer to agree upon procedures and remedies, is to compel the state to surrender the power to define the true extent of the protection. Federal labor policy has never given unions the power to waive state law protections, and the Court should not accept respondent's invitation to rewrite forty years of labor law when Congress has declined to do so.

In sum, the right to bargain has never been equated with the right to bargain away the substantive protections of state and federal law. Because respondent's argument depends on such an equation, it should be rejected.

2. PETITIONER'S CLAIM IS INDEPENDENT OF THE AGREEMENT.

The Seventh Circuit tried to conform its decision to *Allis-Chalmers v. Lueck* arguing that resolution of petitioner's state law claim actually depends on an interpretation of the collective bargaining agreement. Although respondent does not seek to defend this reasoning, *amicus* Chamber of Commerce has attempted to do so. Br. at 17-20. According to the Chamber, even if the state court does not decide whether the employer had contractual "just cause" for the discharge, the employer will defend against a claim of retaliation by asserting that it *did* have just cause under the contract. Then, in turn, the plaintiff would seek to show either that the contract forbids the proffered reason or that other employees, whose misconduct and work records are similar, have not been discharged for the same reasons. Inasmuch as an arbitrator must make the same determinations in a "just cause" case, the Chamber argues, the court in a retaliatory discharge case will, as a practical matter, decide whether the contract was violated, which is what *Allis-Chalmers* forbids.[4]

To this line of reasoning there are several answers. First, although the Chamber has set forth a possible scenario by which a retaliatory discharge case may be litigated, it is by no means the only scenario, let alone a typical one, as the facts of this case illustrate. Here Norge told Lingle that she was fired because she had filed a false claim of injury, and it has never changed its position. *E.g.*, Resp. Br. at 5. The com-

[4]By contrast, respondent's *amicus* EEAC openly rejects the *Allis-Chalmers* distinction between claims that are substantially dependent on interpretatrion of the agreement and independent state law claims, referring to it as a "facile distinction" that has no relevance to preemption analysis. Br. at 15-16.

pany has disputed that Lingle was injured and has said that she knowingly misrepresented her physical condition, but those factual issues can be resolved without any reference to the collective bargaining agreement or to the employer's practice in other cases. The only legal issue would arise if respondent prevailed on its factual claims, and then the court would have to decide whether the falsity of the worker's compensation claim is a defense to a retaliatory discharge claim. But that question too will be resolved without reference to the contract, because if the defense is not viable under state law, it will be irrelevant whether the union has agreed to waive it. *Allis-Chalmers*, 471 U.S. at 212.[5]

Second, even if the employer's defense is that it had another, presumptively valid reason for the discharge (for example, poor work or absenteeism), that defense can be adjudicated by comparing the plaintiff's treatment with that of other workers with similar records. Those factual matters can be resolved without reference to the contract, just as they can in cases arising in a nonunion workplace, where, if a "dual motive" defense were raised, there would be no agreement to which to refer in deciding the issue.

Third, the same objections that the Chamber raises in this case could be (and were) raised in the *Gardner-Denver* line of cases. There, as here, an employer may raise a dual motive defense in order to show that the reason for discharge was

[5]Contrary to respondent's brief, at 27 n.14, that legal question is not even addressed by *Wayne v. Exxon Coal USA*, 157 Ill. App. 514, 510 N.E.2d 468 (1987). Rather, that court ruled, as a factual matter, that the employee had been fired for presenting fraudulent doctor's slips to support several absences, and not for filing the perfectly valid worker's compensation claim for an injury that occurred after the slips were submitted. The question of whether an employer may litigate the validity of an injury claim by firing the worker, rather than by defending the claim itself, has not been decided in Illinois.

not race but poor work. However, the court's need to explore the employer's actual practice, which happens to occur under a collective bargaining agreement, in order to decide the statutory claim, is no reason to rule that the court may not decide the claim at all.[6]

3. THE *GARDNER-DENVER* LINE OF CASES IS NOT DISTINGUISHABLE.

Respondent and both of its *amici* object strenuously to petitioner's invocation of the *Gardner-Denver* line of cases, pointing out that these cases all involved federal statutes, although the cause of action in this case is provided by Illinois law. But respondent fails to explain why this admitted distinction should make any difference. The ultimate question remains, did Congress intend to prevent the states from extending their minimum standards of employment to union and nonunion workplaces alike, or to prevent the states from providing a judicial forum to both kinds of workplaces notwithstanding the existence of collectively-bargained grievance procedures? In light of the Court's recognition of the values of federalism that counsel against preemption of state laws, and the resulting presumption against preemptive intent, as well as the citation of the *Gardner-Denver* line of cases in this Court's state preemption cases, Pet'r Br. at 22, respondent has provided no reason for believing that Congress would have wanted to make available judicial and administrative forums to enforce

[6]To the extent that the contractual and statutory questions are parallel, the court weighing a federal claim will give an arbitral disposition the weight that it deserves under the circumstances. *See Gardner-Denver*, 415 U.S at 60 and n.21. Although it is open to the state courts to adopt a comparable position as a matter of state law, that option does not support the complete preemption that respondent urges.

its own statutes, but to deny states a comparable mechanism for enforcing their laws.

Respondent does hint at one such reason when it objects to what it sees as an "unacceptable state-law balkanization of employment rights" whereby "the authority for establishing the terms and conditions of employment would be . . . delivered, piecemeal, to the legislatures of the fifty states," thus "nullify[ing] on a state-by-state basis the private system of industrial self-government." Resp. Br. at 11, 29-30 (punctuation omitted). The argument, presumably, is that Congress might be willing to impose its own limitations on the terms and conditions of employment, but not be willing to tolerate the risk that the various states might impose different kinds of limitations on the same employer, depending on the location of the plant. This objection has no relevance to cases such as this where the collective bargaining agreement governs a single plant in a single state. J.A. 8-9. But, more fundamentally, there is no reason to believe that, as a general matter, Congress intended that employers who enter into collective bargaining agreements would be exempt from state laws protecting the rights of their employees in the various places where they choose to do business. That is simply the consequence of the long-settled rule, discussed *supra*, at 3-10, that states retain the police power to regulate the terms and conditions of employment in union and nonunion shops alike, unless Congress has specifically removed a particular subject matter from the states' power.

The possibility that states may make different choices is both the beauty and the burden of federalism. It is a beauty because an employer may simply move to another state to avoid or obtain desired regulations, or may threaten to move to induce a state to change. It is a burden because the same person may have to adapt to different regulations in different states. Con-

gress has accepted this Court's decisions over the years that have found a lack of Congressional intent to forbid state regulation of employment conditions, with a few specific and express exceptions, such as ERISA. If employers wish to obtain a different national approach to employment issues, they should seek relief from Congress.

4. STATE RETALIATORY DISCHARGE LAWS DO NOT UNDERCUT THE NATIONAL POLICY FAVORING COLLECTIVE BARGAINING AND ARBITRATION OF CONTRACT GRIEVANCES.

Respondent and its *amici* contend that, if petitioner's arguments are accepted, the floodgates will open, and the states will adopt a wide variety of detailed regulations of the terms and conditions of employment, the consequence of which will be to frustrate the national policy favoring collective bargaining and grievance arbitration by making private agreements essentially superfluous. Resp. Br. at 29-30; EEAC Br. at 17-18; Chamber of Commerce Br. at 6-11, 21-22. Aside from the facts that this is a policy argument properly addressed to Congress, and that it is premised on a highly speculative assumption about what the various states are likely to do, the dangers to the arbitration process that are posed by petitioner's state law claim are vastly overstated.

First of all, by upholding petitioner's claim, the Court would neither explicitly nor implicitly pass on the preemption of state claims based on the "implied obligation of good faith and fair dealing" or based on employers' oral or written representations. *See* Chamber of Commerce Br. at 10. It is unclear, for example, whether such state law claims are non-negotiable, whether they implicate contractual terms in a way similar to *Allis-Chalmers*, or whether they protect substantive condi-

tions of employment, as opposed to governing the process by which conditions are negotiated between individuals and employers. Whether claims based on an express or implied agreement between employer and employee, of the sort that were involved last Term in *Caterpillar v. Williams*, 107 S. Ct. 2425 (1987), are truly independent of collective bargaining and of the collective bargaining agreement is a very different (and, in our view, closer) question than the independence of a claim like petitioner's.

Second, as our opening brief observed, there are some 24 federal statutes, many enacted in recent years, that provide independent remedies against discharges of union and non-union employees alike. Pet'r Br. at 14 n.3 and Addendum. In so doing, Congress has made the judgment that such "deprivatization of labor relations law," Horowitz, *Foreword* 49 Law & Contemp. Prob. 1 (1986), is consistent with the national interest and with the system of collective bargaining. And there is no reason to believe that Congress perceives any greater threat from states laws that, by their terms, apply only within their own territory. In any event, this case involves a very limited regulation that simply forbids employers to penalize employees for seeking workers compensation benefits, and allowing such claims will scarcely have an impact comparable to Congress' two dozen retaliatory discharge statutes.[7]

[7]Further research has identified five more federal statutes: Federal Surface Mining Act, 30 U.S.C. § 1293; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Toxic Substances Control Act, 15 U.S.C. § 2622; Safe Container Act, 46 U.S.C. § 1506; Immigration Reform Act of 1986, 8 U.S.C. § 1324b. Respondent argues that, under the view of a majority of the Justices in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 358, 366 (1971), each such statute must be considered on a case-by-case basis to decide whether the remedy is superseded by the grievance procedure. Br. at 33. Even if that was true at the time of *Arguelles*, the Court has formulated a general rule in *Gardner-Denver* and *Barrentine v. Arkansas-Best Freight System*, 459 U.S. 728 (1981), that applies across the board to statutes that provide minimum, non-negotiable guarantees to individual workers. *See also McKinney v. Missouri-Kansas-Texas RR Co.*, 357 U.S. 265, 268-270 (1957). Thus, the lower courts have uniformly held that remedies provided by the type of statutes cited in this footnote and in the opening brief are not superseded by the arbitration procedures of collective bargaining agreements. *E.g. Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987); *Barrowclough v. Kidder, Peabody*, 752 F.2d 923, 939-941 (3d Cir. 1985); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1983); 618 F.2d 1220 (7th Cir. 1980) *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980); *Carothers v. Western Transp. Co.*, 554 F.2d 799, 806 (7th Cir. 1977); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1155-1159 (D.C. Cir. 1975).

Finally, there is no basis for the contention that allowing petitioner's claim will undercut the national policy favoring arbitration clauses or will discourage arbitration of discharge grievances. To be sure, employers have been making that very threat for at least twenty years, *see* 20 Proceedings of the National Academy of Arbitrators 152-153 (1967) (remarks of Willis Ryza). But despite the steady increase in the availability of independent forums for the resolution of independent claims of unlawful discharge, the data in petitioner's opening brief — unrebutted by respondent and its *amici* — show that employers have increasingly agreed, not only to arbitration clauses, but also to the very sort of contract clauses for which independent remedies already exist. Pet'r Br. at 28-29 and n.8. And studies also show that, notwithstanding the possibility of a "second bite at the apple," employers and unions continue to invoke the arbitration procedure for the resolution of discrimination grievances. Hoyman & Stallworth, *Arbitrating Discrimination Grievances in the Wake of Gardner-Dener*, 106 Monthly Lab. Rev. 3 (Oct. 1983). Thus, there is little basis for concern that permitting claims for retaliatory discharge to proceed in unionized shops will pose any threat to the national policy favoring arbitration of disputes about the interpretation or application of collective bargaining agreements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

February 22, 1988

AMICUS CURIAE

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAMES E. PFANDER
CYNTHIA M. MOORE
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036-3195
(202) 466-6464
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
Suite 349
444 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Section 301 of the Labor-Management Relations Act preempts state retaliatory discharge claims that were developed to protect the integrity of the States' workers' compensation statutes when an applicable collective bargaining agreement prohibits discharge without "just cause."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES--Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-259

JONNA R. LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

Amici's concern in this case stems from the Seventh Circuit's inappropriate extension of the preemptive effect of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, into an area traditionally regulated by

the States. Each State has enacted a system for compensating victims of workplace injury. Many of these state workers' compensation schemes, like the Illinois law at issue here, prohibit employers from discharging workers for filing compensation claims. Some thirty-four States and the District of Columbia protect employees from such employer retaliation.

Without any apparent concern for the important state interest at stake—an interest to which Congress has repeatedly deferred—the court below held that collectively bargained restrictions on discharge without "just cause" preempt state law tort claims for retaliatory discharge. In reaching this result, the court ignored the fact that the state court complaint in this case rests upon a body of state law independent of the applicable labor contract. The court thus improperly broadened Section 301 preemption to abolish state claims that neither require the interpretation of a collective bargaining agreement nor implicate the federal interest in uniform interpretation of such agreements. Indeed, to the extent that federal labor policy seeks to promote voluntary collective bargaining agreements, the decision below disserves that policy by denying minimum state employment protections to the employees covered by such agreements.

Because of the great importance of the issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

Petitioner, Jonna Lingle ("Lingle"), was employed by Respondent, the Norge Division of Magic Chef, Inc. ("Magic Chef"). Her employment was covered by a collective bargaining agreement between Magic Chef and Local Union 554, International Association of Machinists, AFL-CIO. Like most collectively bargained contracts, that agreement precluded discharge of an employee without "just cause." The contract also provided for arbitration of all disputes arising thereunder.[2]

[1] Pursuant to Rule 36.2 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

In December 1984, Magic Chef fired Lingle shortly after she gave notice to Magic Chef that she had been injured on the job and would seek benefits under the Illinois Workmen's Compensation Act (the "Act"). She promptly filed a grievance regarding her discharge that was pursued through arbitration.[3] In July 1985, Lingle filed suit against Magic Chef in the Illinois Circuit Court seeking damages for retaliatory discharge. The complaint asserted that Magic Chef had violated Illinois public policy by discharging Lingle solely in retaliation for her invocation of rights under the Act. The complaint did not refer to or rely upon the collective bargaining agreement in any manner.

Magic Chef removed the action to the United States District Court for the Southern District of Illinois and promptly moved to dismiss or for a stay pending arbitration of Lingle's grievance under the labor contract. The district court granted Magic Chef's motion to dismiss, concluding that Lingle's state law retaliatory discharge claim was preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ("LMRA"). *Lingle v. Norge Division of Magic Chef, Inc.*, 618 F. Supp. 1448 (S.D. Ill. 1985). The Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed. *Lingle v.*

[2] In addition, Article 8, ¶ 8.2 of the agreement barred the arbitrator from "add[ing] to, subtract[ing] from, or modify[ing] any of the terms of this Agreement, or [] establish[ing] any conditions not contained in this Agreement." J.A. at 11.

[3] The arbitrator, in a decision issued almost two years after Lingle's discharge, found that the discharge had not been for "just cause" and awarded her back pay and reinstatement with full seniority.

Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987).

The majority found that Lingle's retaliatory discharge claim was preempted by Section 301 because that claim "depend[s] on an analysis of the terms of the collective bargaining agreement" and is "inextricably intertwined, by [its] own terms, with her collective bargaining agreement." 823 F.2d at 1044. The majority expressly dismissed Lingle's contention that her state law claim does not derive from, refer to, or require the interpretation of the labor contract covering her employment at Magic Chef:

> The plaintiffs argue that the definition of retaliatory discharge in Illinois does not expressly require an interpretation of a collective bargaining agreement. . . . However, this reasoning is inverted; the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge. It is the scope of the contract that must be analyzed initially.

Id. at 1046. The majority determined that a "just cause" provision in an applicable collective bargaining agreement provides the exclusive remedy for improperly motivated discharges and, therefore, precludes the State from providing independent remedies for discharges that violate substantial public policies.

Having determined that Section 301 preempted Lingle's retaliatory discharge claim, the majority had little trouble concluding that her claim was properly removed to federal court. Although its analysis is, at times, less than clear,[4] the lower court essentially applied the "complete preemption" doctrine under which the "extraordinary" preemptive force of Section 301 converts Lingle's state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). Thus, the lower court recharacterized Lingle's retaliatory discharge claim as one "arising under" Section 301 of the LMRA.[5]

[4] The majority stated that the issue of preemption is separate from and may be considered only after the question of removal has been resolved. *See Lingle*, 823 F.2d at 1037-38. This Court's decisions make clear that the converse is true, *i.e.*, the issue of removal can only be resolved by consideration of whether Section 301 completely preempts the state law claim. *See Caterpillar Inc. v. Williams*, 107 S. Ct. 2425 (1987).

Judge Ripple, joined by Judge Cudahy in a forceful dissent, soundly criticized the majority for "trivialization of important state interests." 823 F.2d at 1051. The dissent explained that, under the "focused" preemption analysis required by this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the state retaliatory discharge claim is independent of the collective bargaining agreement and, thus, not within the preemptive scope of Section 301. 823 F.2d at 1053.

INTRODUCTION AND SUMMARY OF ARGUMENT

A proper application of the standard set by the Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), easily resolves the preemption issue in this case. Although

[5] Magic Chef removed the case to federal district court asserting diversity of citizenship as the jurisdictional basis. *Lingle*, 823 F.2d at 1034. On appeal, Lingle argued that Congress had explicitly proscribed removal on diversity grounds of claims "arising under" state workers' compensation laws. See 28 U.S.C. § 1445(c). Notwithstanding Magic Chef's argument that Lingle had waived her objections to removal, the Seventh Circuit reached the question and held the statutory bar in § 1445(c) inapplicable because "the plaintiffs' . . . claims arise under federal law." *Lingle*, 823 F.2d at 1039. As *amici* will show, however, the Seventh Circuit erred in upholding removal on this basis. Lingle's claim is not "completely preempted" by, and does not arise under, Section 301. Thus, this action was removed in violation of § 1445(c) and should be remanded, pursuant to 28 U.S.C. § 1447(c), for disposition in the Illinois state courts.

the Seventh Circuit recognized that *Allis-Chalmers* calls for an analysis of the extent to which a state tort claim "substantially depend[s]" upon the interpretation of a collective bargaining agreement, the lower court incorrectly concluded that Section 301 bars an employee from asserting a retaliatory discharge claim that rests on an independent body of state law. This error apparently resulted from the court's mistaken view that Congress intended, in enacting Section 301, to make the collectively bargained dispute resolution machinery the exclusive remedy for all claims of wrongful discharge, including claims, like Lingle's, that in no sense rest upon the labor contract.

Such an expansive view of Section 301's preemptive force threatens to displace an entire body of state law that has developed in an area where Congress has consistently deferred to and accommodated state regulation and control. Lingle's claim lies at the core of the Illinois workers' compensation system. At least thirty-four States and the District of Columbia protect workers from such retaliatory employer conduct that could frustrate and substantially subvert their comprehensive state workers' compensation systems. See Appendices A through C, at pp. 1a-5a. Thus, the retaliatory discharge claim here at issue represents one of the "myriad state laws . . . set[ting] minimum labor standards" that the federal labor laws were not "intended to disturb." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

The lower court's decision plainly "disturb[s]" these "minimum standards" and in doing so fundamentally misconceives the nature of the Court's Section 301 preemption decisions. The preemptive force of Section 301 applies only to state tort actions that are inextricably intertwined with consideration of the labor contract. *See Allis-Chalmers*, 471 U.S. at 212-13. Because Lingle's state retaliatory discharge claim is independently derived

from Illinois law, "questions of contract interpretation [do not] underlie any finding of tort liability" (*id.* at 218), and the preemptive force of Section 301 is not felt.

The Seventh Circuit's difficulty in applying well-established principles that this Court restated only last Term in *International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161 (1987), suggests the need for this Court to reiterate forcefully the limited preemptive scope of Section 301. State-created rights are preempted only if "any attempt to assess liability [under the state claim] . . . will inevitably involve contract interpretation." *Allis-Chalmers*, 471 U.S. at 218. This limitation on Section 301 preemption clearly shows that the presence of a "just cause" provision in a collective bargaining agreement does not, by itself, provide a sufficient basis for the displacement of retaliatory discharge claims that rest entirely upon an independent body of state law.

ARGUMENT

I. CONGRESS DID NOT INTEND THE LMRA TO DISPLACE INDEPENDENT STATE WORKERS' COMPENSATION RETALIATORY DISCHARGE CLAIMS

In determining whether a particular state action is preempted by federal law, this Court has long held that "'[t]he purpose of Congress is the ultimate touchstone.'" *Allis-Chalmers*, 471 U.S. at 208 (quoting *Retail Clerks International Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Congress has never expressed an intention to supplant all state regulation affecting unionized employees. In fact, the Court has observed that Congress did not intend to preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Amalgamated Ass'n of Street, Electrical Railway, & Mo-*

tor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971).[6]

This Court has repeatedly emphasized the States' traditional latitude under their police powers to establish minimum standards in the area of "occupational health and safety" such as workers' compensation laws. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). Interstitial congressional initiatives in the labor relations field were not "intended to disturb the myriad state laws" that set such minimum employment standards. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 756. In particular, this Court has never entertained a "successfu[l]" argument that Congress intended "to exclude unionized workers and employers from laws establishing" federal or state minimum employment standards. *Id.* at 755.

The legislative history of Section 301, essentially silent on the question of preemption, certainly fails to disclose any congressional intent to displace the minimum standards established by workers' compensation laws. In such cases of congressional silence, the Court has looked beyond the language and structure of the particular statute to consider other "more reliable indici[a] of congressional intent." *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). Such an inquiry here reveals a consistent pattern of congressional deference to state compensation schemes. *Amici* review this history of congressional accommodation below, showing that an intent to preempt the type of important workers' compensation

[6] *See Allis-Chalmers*, 471 U.S. at 208; *De Canas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority to regulate the employment relationship to protect workers."); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942) (quoting *Napier v. Atlantic Coast Line RR*, 272 U.S. 605, 611 (1926)) ("This Court has long insisted that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested.'").

right asserted by Lingle should not lightly be attributed to the Congress that enacted the federal labor contract scheme of Section 301.[7]

A. Congress Has Recognized That Federal Law Can Coexist With And Should Accommodate Comprehensive State Workers' Compensation Systems

In the late 1800's, an employee's right to compensation for work-related injuries was subject to the vagaries of the common law and an ever-expanding arsenal of employer defenses. In the face of increasing on-the-job injuries, States enacted workers' compensation statutes to provide a "certain and expeditious remedy for injured employees." *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 444 (Tenn. 1984).[8] New York enacted the first such statute in 1910, and other States promptly followed. By 1949, workers' compensation legislation was in place in every State in the Union. See 1 A. Larson, *Workmen's Compensation Law* §§ 5.20-.30 (1987) (hereinafter "Larson").

From the outset of the development of state workers' compensation legislation, the federal courts and Congress

[7] *Amici* recognize that Section 301 preemption analysis does not involve a balancing of state and federal interests (*cf. Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 749), but requires instead a searching analysis of the state claim, as applied, to ascertain whether it conflicts with the federal labor contract scheme. *Allis-Chalmers*, 471 U.S. at 208-09. The Court has consistently recognized, however, that relevant evidence of congressional intent must inform the analysis of Section 301 preemption.

[8] *See, e.g., Santiago v. Employee Benefits Services*, 168 Cal. App. 3d 898, 901, 214 Cal. Rptr. 679, 681 (1985); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-81, 384 N.E.2d 353, 356 (1978); *Brown v. Leighton*, 385 Mass. 757, 761, 763, 434 N.E.2d 176, 179, 180 (1982); *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 437, 258 N.W.2d 414, 422-23 (1977); *Boyle v. G. & K. Trucking Co.*, 37 N.J. 104, 112, 179 A.2d 514, 518-19 (1962); *Wagner v. National Indemnity Co.*, 492 Pa. 154, 161-62, 422 A.2d 1061, 1065 (1980); *Nigbor v. Department of Industry, Labor & Human Relations*, 120 Wis. 2d 375, 382, 355 N.W.2d 532, 536 (1984).

recognized the preeminence of state regulation in this area. As early as 1917, the Court noted that "the matter of compensation for accidental injuries . . . is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies." *See Mountain Timber Co. v. Washington*, 243 U.S. 219, 239 (1917). Similarly, throughout the early 1900's, Congress was careful to minimize federal intrusion into state regulation of workers' compensation.[9]

For example, the 1927 Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"), attempted to fill the gaps between state systems by compensating maritime workers injured on navigable waters outside of the jurisdiction of any State. In so doing, however, Congress "anticipat[ed] that dockside accidents [involving maritime workers] would remain under the umbrella of state law and state workmen's compensation systems." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 208 (1971).[10]

By the time of the enactment of Section 301 of the LMRA in 1947, Congress was fully cognizant of the important role of comprehensive state workers' compensation statutes. In view of this history, congressional in-

---

[9] See, *e.g.*, Act of June 25, 1936, ch. 822, 49 Stat. 1938-39 (codified as amended at 40 U.S.C. § 290) (authorizing application of state workers' compensation laws to workers on federal projects); United States Employees' Compensation Act, ch. 458, 39 Stat. 742 (establishing a compensation system solely for federal employees); Longshore and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901-950) (establishing compensation system for maritime workers).

[10] Furthermore, the compensation system established by the Act may be invoked concurrently with any applicable state compensation statute, resulting in minimal federal interference with state authority in this area. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980).

tent to limit state action in such a well-established area of state control through the passage of Section 301 should not be presumed or implied without clear evidence. *See generally Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942) (quoting *Napier v. Atlantic Coast Line RR*, 272 U.S. 605, 611 (1926)) (congressional intent to preempt state police power regulations must be "clearly manifested"). No evidence of such an intention can be found in the LMRA or its legislative history. In fact, all evidence indicates that Congress expected the federal labor laws and state workplace health and safety legislation to coexist comfortably.[11]

Subsequent congressional action also supports this conclusion. In 1970, Congress established a National Commission on State Workmen's Compensation Laws to study and recommend action to correct any deficiencies in the state systems. The Commission's report recognized the importance of continued state independence in this area by "reject[ing] the suggestion that Federal administration be substituted for State programs." Report of the National Commission on State Workmen's Compensation Laws 126 (July 1972).

---

[11] As this Court recently observed, there was, at the time of enactment of the comprehensive labor relations scheme of the National Labor Relations Act of 1935, "no suggestion . . . that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards. . . . To the contrary, . . . Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 757. Consequently, in enacting the LMRA twelve years later, it is extremely unlikely that Congress would, without comment, " 'remove the backdrop of state law that provided the basis of congressional action.' " *Id.* (quoting *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 228 (1970) (Burger, C.J. concurring)).

In response to the Commission's findings of weaknesses in some state systems, members of Congress sponsored bills to establish federal minimum standards for state workers' compensation. These bills were never reported out of committee and faced opposition from both the legislative and executive branches of the federal government due to concerns that such legislation would destroy the tradition of state control in this area.[12]

Federal statutes enacted since 1947 have been carefully designed to supplement state regulation of workers' compensation while avoiding federal disruption of comprehensive state schemes. For example, Congress expressly determined that the Occupational Safety and

[12] For example, many speakers at the hearings on these bills focused upon the risk of federal disruption of state systems. See, *e.g., National Workers' Compensation Standards, 1974: Hearings on S. 2008, S. 1029, S. 1772 and S. 2587 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 2274 (1974) (statement of Richard Schubert, Undersecretary, U.S. Dept. of Labor) ("[W]e feel that Federal legislation at this time is at best premature. At worst, it may be both unwarranted and unnecessary."); *National Workers' Compensation Standards Act of 1979: Hearings on S. 420 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 53 (1980) (statement of Sen. Hatch) ("I am sure the charge will be made that this is the first step to an eventual Federal takeover of this traditionally State operated program. That charge must be responded to.").

Even proponents of these bills recognized that federal workers' compensation legislation should only supplement and should never supplant state control. See, *e.g., National Workers' Compensation Act of 1975: Hearings on H.R. 9431 Before the Subcomm. on Manpower, Compensation, and Health and Safety of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 710 (1976) (statement of Sen. Javits) ("We certainly do not want a Federal workers' compensation system."); *National Workers' Compensation Standards Act of 1978: Hearings on S. 3060 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978) (statement of Sen. Williams) ("The bill before us today . . . neither usurps the resources or prerogative of State agencies nor threatens to make a wholesale substitution of Federal enforcement in place of State enforcement.").

Health Act of 1970, 29 U.S.C. §§ 651-678, which establishes a broad system for federal regulation and oversight of workplace safety, should not preempt or in any manner affect state workers' compensation laws "or the rights, duties, or liabilities of employers and employees" under them. *Id.* at § 653(b)(4).

Similarly, in 1958, Congress amended the statute governing removal of state litigation to federal court to preclude removal of civil actions arising under state workers' compensation laws, even if such cases would fall within the federal courts' diversity jurisdiction. See 28 U.S.C. § 1445(c). This action was motivated, in part, by a congressional desire to protect the integrity of state compensation statutes. Congress was concerned that removal of such suits would defeat the States' important interest in administering their own systems and would undermine state laws by allowing defendants to force plaintiffs to pursue their claims outside of the simple and less expensive state procedures. *See Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 350-52 (1961).

Congress has not only sought to avoid direct conflict between state and federal law but has also tried to ensure that federal programs would not indirectly undermine state workers' compensation systems. Thus, in 1965, Congress amended the Social Security Act to require a claimant for federal disability insurance benefits to offset from those benefits any amount received under a workers' compensation system. See Pub. L. No. 89-97, § 335, 79 Stat. 406, as amended by Act of Apr. 7, 1986, Pub. L. No. 99-272, § 12109(a), 100 Stat. 286 (codified at 42 U.S.C. § 424a). This amendment was prompted by congressional concern that "perpetuation of the duplication in benefits might lead to the erosion of the workmen's compensation programs." *Richardson v. Belcher*, 404 U.S. 78, 83 (1971). See also 26 U.S.C. § 104(a)(1) (federal income tax not assessed on workers' compensation benefits).

As this Court has observed, federal courts should "proceed with caution" when asked to construe federal law in a manner that would "intrude on an area that has heretofore been reserved for state law, . . . and . . . furnish opportunity for circumventing state workmen's compensation statutes." *Victory Carriers*, 404 U.S. at 212. The history of federal deference to and accommodation of state workers' compensation legislation in all areas of federal regulation, including the federal labor laws, confirms that Congress did not intend Section 301 to preempt any aspect of such state schemes.[13] It clearly follows that Congress did not intend to displace state retaliatory discharge protections, which, as the next section shows, are an integral part of state compensation schemes.

B. Retaliatory Discharge Claims Are An Integral Part Of Comprehensive State Workers' Compensation Systems

The state workers' compensation schemes in place in every State reflect a carefully considered judgment that workers would receive prompt and adequate compensation for work-related injuries. States have recognized that employers could effectively "nullify the basic purposes of the . . . workmen's compensation system" by discharging employees who exercise their rights under the statute. *See Hansen v. Harrah's*, 100 Nev. 60, 64, 675 P.2d 394, 397 (1984). As early as 1925, Missouri enacted a statute that expressly precluded retaliatory discharge in the workers' compensation context; many States have since agreed that retaliatory discharge protections are an essential element of their workers' compensation systems.

[13] Other federal statutes, including the LHWCA, and the Federal Employers' Liability Act (Railroads) ("FELA"), 45 U.S.C. §§ 51-60, provide evidence that compensation schemes with retaliatory discharge protections do not impede the congressional policy of fostering collective bargaining. Both these statutes contain retaliatory discharge remedies, and both affect employees in traditionally unionized industries. Congress has never limited any aspect of the federal compensation scheme in light of the policies underlying Section 301. Indeed, this Court held only last Term that the dispute resolution machinery of the Railway Labor Act does not displace FELA remedies for retaliatory discharge. *See Atchison, Topeka & Santa Fe Ry. v. Buell*, 107 S. Ct. 1410 (1987).

At present, some thirty-four States and the District of Columbia have adopted by legislation or judicial decision some form of protection against retaliatory discharge. Twenty States and the District of Columbia provide a statutory civil action to employees who were discharged for pursuit of workers' compensation remedies.[14] Nine States have enacted statutory prohibitions against such retaliatory discharges, and the courts in the majority of those States have implied a private right of action for persons injured by a violation.[15] Five States have judicially determined that comprehensive workers' compensation schemes can be maintained only through the recognition of a private right of action to redress such retaliatory conduct.[16]

The States experimented with alternative sanctions for employer misconduct but settled on civil remedies as the mechanism best calculated to effectuate the States' dual

[14] A list of these statutes is set forth in Appendix A to this brief at pp. 1a-2a.

[15] A list of these statutes and decisions is set forth in Appendix B to this brief at pp. 3a-4a.

[16] A list of these decisions is set forth in Appendix C to this brief at p. 5a. For a review of the history of the development of retaliatory discharge claims in the workers' compensation context, see *Lally v. Copygraphics*, 173 N.J. Super. 162, 169-72, 413 A.2d 960, 963-65 (1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981); 2A Larson, § 68.36(a); Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551, 551-65 (1986) (hereinafter "Love").

policies of compensation and deterrence.[17] As the Supreme Court of Illinois explained in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 185, 384 N.E.2d 353, 358-59 (1978), the State's policies

> can only be effectively implemented and enforced by allowing a civil remedy for damages, distinct from any criminal sanctions which may be imposed on employers. . . . It is conceivable, . . . that some employers would risk the threat of criminal sanction in order to escape their responsibility under the Act.

Consequently, States that have adopted criminal penalties for retaliatory discharge have frequently authorized the injured party to bring a civil action to enforce the policy reflected in the criminal provision. See, *e.g.*, Mo. Rev. Stat. § 287.780 (Vernon Supp. 1987); *Lally v. Copygraphics*, 173 N.J. Super. 162, 172-73, 413 A.2d 960, 965 (1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981); *Kelsay v. Motorola*, 74 Ill. 2d at 184-85, 384 N.E.2d at 358-59.

As a result of such experiences, the States have widely concluded that the continued vitality of their comprehensive compensation statutes depends on the existence of tort claims to protect against retaliatory discharge.[18]

---

[17] Missouri's 1925 statute contained criminal penalties for employer reprisals, but was apparently little used. *See Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (the first reported appellate decision in 30 years to consider the statute).

[18] *E.g.*, *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449, 457 (1984), *appeal dismissed sub nom. Pan American World Airways, Inc. v. Puchert*, 472 U.S. 1001 (1985) ("this statute . . . preserve[s] the integrity of the workers' compensation law"); *Kelsay v. Motorola*, 74 Ill. 2d at 182-84, 384 N.E.2d at 357-58; *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1024, 366 N.E.2d 1145, 1147 (1977) (retaliation "subvert[s] the operation of the [compensation] Act"); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973) (fear of retaliation "undermines a critically important public policy"); *Murphy v. City of Topeka-Shawnee County Dept. of Labor Services*, 6 Kan. App. 2d 488, 630 P.2d 186, 192 (1981) (retaliatory discharge "substantially subvert[s] the purpose of the act"); *Firestone Textile Co. Division, Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730, 732 (Ky. 1984) (without a retaliation claim "the beneficent purposes of the Act could often be effectively frustrated"); *Hansen v. Harrah's*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984) ("failure to recognize the cause of action for retaliatory discharge would . . . frustrate the purpose of our workmen's compensation laws"); *Lally v. Copygraphics*, 173 N.J. Super. at 170, 413 A.2d at 963 (retaliatory conduct has a "grave potential for undermining the remedial purposes and functioning of the workers' compensation scheme"); *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 6, 416 N.Y.S. 2d 554, 556, 389 N.E.2d 1075, 1077 (1979) (retaliation claim will "promote the integrity of . . . [compensation] proceedings"); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 444-45 Tenn. 1984) (retaliatory discharge claims are "necessary to enforce the duty of the employer, to secure the rights of the employee and to carry out the intention of the legislature"); *Ruiz v. Miller Curtain Co.*, 702 S.W.2d 183, 185 (Tex. 1985), *cert. denied*, 106 S. Ct. 3295 (1986). *See also Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987) (the state claim aids "California's enforcement of the underlying statute or policy").

Civil remedies for such discharges are, as the Oregon Supreme Court has observed, "an integral part of the legislative scheme." *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 88, 611 P.2d 281, 290 (1980).[19]

Through its own legislative action Congress has agreed with the States that a civil action for retaliatory dis-

---

[19] Other state laws that include retaliatory discharge remedies provide further evidence that such a claim is an integral component of broad regulatory statutes. *E.g.*, Cal. Gov't Code § 12940(b) (West Supp. 1987) (employment discrimination); Cal. Lab. Code § 6310 (West Supp. 1987) (workplace health and safety); Ill. Ann. Stat. ch. 48, ¶ 59.2(d)(9) (Smith-Hurd 1986) (workplace health and safety); Ill. Ann. Stat. ch. 68, ¶ 6-101(A) (Smith-Hurd Supp. 1987) (employment discrimination); Mass. Gen. Laws Ann. ch. 151B, § 4.4 (West 1982) (employment discrimination); Mass. Gen. Laws Ann. ch. 111F, § 13 (West Supp. 1987) (hazardous substances in the workplace); N.J. Stat. Ann. § 10.5-12(d) (West Supp. 1987) (employment discrimination); Tex. Rev. Civ. Stat. Ann. art. 5221K § 5.05(a)(1) (Vernon 1987) (employment discrimination). The Seventh Circuit's analysis of Section 301 preemption thus threatens the continued vitality of the state policies underlying a wide array of legislative enactments.

charge is critical to the effective functioning of a comprehensive regulatory scheme. For example, the LHWCA, one of the few federal compensation statutes, outlaws retaliatory discharge and authorizes civil relief for such discharges.[20] See 33 U.S.C. § 948a. Similarly, the Occupational Safety and Health Act of 1970 ("OSHA") prohibits retaliatory discharge for an employee's invocation of rights under the Act and provides for prompt administrative review of charges of retaliation. See 29 U.S.C. § 660(c).[21] Title VII and the Employee Retirement Income Security Act contain analogous provisions.[22]

In light of the continued recognition of the importance of effective retaliatory discharge remedies, it is apparent that federal preemption of such state claims for employees covered by collective bargaining agreements would substantially undermine workers' compensation schemes. As explained above, the States have carefully tailored their retaliatory discharge remedies to their objectives of compensating victims of retaliatory discharge and deterring future employer misconduct.[23] Preemption of such claims

---

[20] Congress incorporated the LHWCA into the laws of the District of Columbia to establish the first workers' compensation statute for the District. Act of May 17, 1928, ch. 612, 45 Stat. 600. Thus, when a retaliatory discharge claim was added to the LHWCA in 1972, that right was incorporated by reference into the District of Columbia compensation system.

[21] The Report accompanying the House version of OSHA explained that federal experience with other regulatory statutes had shown that such provisions are necessary: "Experience also has shown that workers are quite reluctant to report Walsh-Healey violations because of the fear that they will lose their jobs. This leads to speculation on how many actual violations are never reported." H.R. Rep. No. 1291, 91st Cong., 2d Sess. 27 (1970).

[22] See Title VII, 42 U.S.C. § 2000e-3(a) (prohibiting retaliatory discharge); Employee Retirement Income Security Act, 29 U.S.C. § 1141 (same).

[23] For example, many States authorize punitive damages for retaliatory discharge. See note 39, *infra*. Other States provide administrative procedures for prompt correction of the improperly motivated discharge. See, *e.g.*, Cal. Lab. Code § 132a (West Supp. 1987); Conn. Gen. Stat. Ann. § 31-290a (West 1987); Haw. Rev. Stat. § 378-33(a) (1985); Me. Rev. Stat. Ann. tit. 39, § 111 (Supp. 1987).

would abolish remedies that the States have identified as best suited to the vindication of these policies.[24]

Furthermore, the dispute resolution machinery of the collective bargaining agreement—which would replace state remedies under the lower court's decision—was not designed and cannot be relied upon to protect the strong state interests that gave rise to retaliatory discharge claims. The union, which controls access to the grievance machinery, must, under federal law, represent fairly all bargaining-unit employees. *See Vaca v. Sipes*, 386 U.S. 171 (1967). That obligation, however, does not necessarily require the union to vindicate state public policy; and it may decline to pursue an employee's retaliatory discharge grievance at any stage in the process.[25]

Even in those cases where the union fully pursues the arbitration remedy, the arbitrator may not be equipped to vindicate the policies that led the State to establish a retaliatory discharge claim. An arbitrator's power is both derived from, and limited by, the collective bargaining

---

[24] In fact, some States have expressed the view that "the threat of punitive damages may be the most effective means of deterring conduct which would frustrate the purpose of our workmen's compensation laws." *Hansen v. Harrah's*, 100 Nev. at 65, 675 P.2d at 397. *See Kelsay v. Motorola*, 74 Ill. 2d at 186, 384 N.E.2d at 359 ("In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim."); *Lally v. Copygraphics*, 173 N.J. Super. at 180, 413 A.2d at 969; *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

[25] If the union does not pursue a grievance or abandons that grievance at any point in the process, the employee is without redress unless he can establish both that his discharge violated the collective bargaining agreement *and* that his union breached its duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171 (1967).

agreement. Thus, the arbitrator must fashion remedies for violation of the agreed-upon work rules; he " 'has no general authority to invoke public laws.' " *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 744 (1981) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)). Indeed, an arbitral award that rests solely on enacted legislation rather than on an interpretation of the collective agreement impermissibly " 'exceed[s] the scope of the submission' " and may not be enforced.[26] *Id.* (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).[27]

The deficiencies of the arbitral process as a mechanism for vindicating public policy reinforce the conclusion that the lower court erred in transforming the grievance machinery into the sole and exclusive remedy for retaliatory discharge claims. In an analogous line of cases, the Court has emphasized the specialized and limited role of the arbitrator in refusing to require claimants under federal workplace discrimination statutes to exhaust arbitral remedies. *See Barrentine; Gardner-Denver.*[28] Like the federal statutes at issue in those cases, the state workers' compensation retaliatory discharge law here at issue

[26] In fact, the labor contract governing Lingle's employment precludes the arbitrator from adding to or modifying the contract. See note 2, *supra*.

[27] By a parity of reasoning, this Court recently held that a reviewing court lacks power to overturn arbitral awards on the basis of "general considerations of supposed public interests." *United Paperworkers International Union v. Misco, Inc.*, 56 U.S.L.W. 4011, 4015 (U.S. Dec. 1, 1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). Such a public policy focus would intrude into the arbitrator's role in interpreting and applying the terms of the labor agreement.

[28] In their discussion of exhaustion, a question not presented in this case, *Barrentine* and *Gardner-Denver* did not address the Section 301 preemption question raised by the present case. Nevertheless, the recognition in those decisions of the limits inherent in the arbitral process provides strong support for rejecting the lower court's expansive preemption analysis.

provides "minimum substantive guarantees to individual workers." *Barrentine*, 450 U.S. at 737. Such independent substantive standards lie entirely outside, and should not be supplanted by, the system of industrial self-government established through collective bargaining.[29]

In sum, Congress has expressed an intention that federal law accommodate state workers' compensation systems. Preemption of a workers' compensation retaliatory discharge claim would substantially undermine such state systems and thus directly conflicts with this long-standing and well-established congressional deference.

II. THE CONGRESSIONAL POLICIES THAT UNDERLIE SECTION 301 DO NOT WARRANT PREEMPTION OF A STATE LAW CLAIM FOR RETALIATORY DISCHARGE

As shown above, the state retaliatory discharge claim currently before this Court lies at the core of a legislative scheme that has long been recognized as a proper and traditional exercise of state police powers. For these reasons, the analysis of whether Section 301 preempts the state law claim at issue in this case must be carefully defined and circumscribed to ensure that preemption is compelled by the policies that underlie Section 301.

A. The Congressional Policies Underlying Section 301 Call For The Application Of A Narrowly Tailored Standard For Section 301 Preemption

In enacting Section 301, Congress sought to establish a uniform body of federal law governing the interpretation

[29] An employee's exercise of the federally protected right to union representation and the union's negotiation of "just cause" discharge protections in the collective bargaining agreement should not prohibit that employee from exercising his state law employment rights. As this Court found in *Metropolitan Life Insurance Co. v. Massachusetts*, "[i]t would turn the policy that animated the [federal labor laws] on its head to understand [those laws] to have penalized workers who have chosen to join a union by preventing them from benefiting from the state labor regulations imposing minimal standards on non-union employers." 471 U.S. at 756.

of collective bargaining agreements. Section 301 preempts only those state laws that threaten that legislative goal.[30] *See, e.g., Allis-Chalmers.* To avoid wholesale displacement of "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract" (*Allis-Chalmers*, 471 U.S. at 212), the Court adopted a narrow standard for determining whether a particular state claim should be displaced:

> Our analysis must focus, then, on whether the [state claim] as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluatior of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213.

Proper application of this standard requires an understanding of both the origins of and the "policies that animate" Section 301 preemption. *Id.* at 210. In its first opportunity to address that issue, the Court emphasized that the prospect of conflicting state and federal interpretations of labor contracts makes the subject matter of Section 301 " 'peculiarly one that calls for uniform law.' " *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quoting *Pennsylvania Railroad v. Public Service Comm'n*, 250 U.S. 566, 569 (1919)). As a result, the Court found that federal substantive law must apply to all claims that assert breach of a collective bargaining agreement, and, therefore, displaces state contract claims that arise from the labor contract. 369 U.S. at 103-04.

---

[30] This case raises only the issue of Section 301 preemption and does not involve the so-called *Garmon* and *Machinists* preemption doctrines. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (preemption of claims arguably within the jurisdiction of the National Labor Relations Board); *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (National Labor Relations Act preemption of state regulation).

Having established that Section 301 preempts state labor contract claims, the Court next considered whether parties may avoid federal law by recharacterizing claims for breach of the labor contract as state tort causes of action. This Court has twice rejected such efforts, holding that Section 301 preempts state claims for bad faith delay in paying benefits due under a collective bargaining agreement *(Allis-Chalmers)* and for failure to discharge safety obligations assumed under a labor contract *(Hechler)*. In both cases, the Court first determined that " 'questions of contract interpretation . . . underlie any finding of tort liability' " and then concluded that it could not permit the plaintiff to "evad[e] the pre-emptive force of § 301" through recharacterization of the claim as a tort. *Hechler*, 107 S. Ct. at 2168 (quoting *Allis-Chalmers*, 471 U.S. at 218).

This Court's decisions thus require a focused analysis to determine whether the plaintiff's state law claim derives from or depends upon duties and obligations established in the collective bargaining agreement.[31] The Seventh Circuit erroneously inverted this analysis by looking first at the collective bargaining agreement and then at the state claim. 823 F.2d at 1046. Such an analysis will extinguish state claims affecting any part of a broad penumbra surrounding the collective agreement and improperly undermine the rule, forcefully restated last Term, that the plaintiff, as "master of the complaint," remains free "to assert state law claims 'inde-

---

[31] The lower court's erroneous resolution of the preemption issue may stem from an incorrect interpretation of dictum in *Allis-Chalmers* in which this Court suggested that state tort claims that attempt to recharacterize contract claims, including claims of "unfair discharge," should be preempted. 471 U.S. at 219. This dictum supports preemption, not of *all* state discharge claims, but only of those claims that depend for their existence upon a "just cause" provision in a labor agreement.

pendent' of a [Section 301] labor contract." *Caterpillar*, 107 S. Ct. at 2431.[32]

B. A Workers' Compensation Retaliatory Discharge Claim Is Not Preempted Under The Standard Set In *Allis-Chalmers*

The history of the Illinois retaliatory discharge claim clearly establishes that Lingle's tort claim arises out of the public policies that underlie state workers' compensation statutes, not out of any contractual right. The Illinois Supreme Court first recognized in *Kelsay v. Motorola* that such a retaliatory discharge claim was necessary "to uphold and implement" the public policies underlying the State's workers' compensation act. 74 Ill. 2d at 181, 384 N.E.2d at 357. In reaching this conclusion, the court looked solely at the policies, principles, and legislative history of the state statute. It made no reference to any contractual relationship that would affect this claim. Consequently, it is apparent that the genesis of Lingle's state claim is independent of any employment contract, including any applicable collective bargaining agreement. *See also Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 10-13, 503 N.E.2d 308, 312-13 (1986), *cert. denied*, 107 S. Ct. 3248 (1987).

Furthermore, the state law claim here at issue will not require Illinois courts to interpret or consider any provision of the collective bargaining agreement in assessing liability. In Illinois, as in most States, a retaliatory discharge claimant can succeed only by showing that she was discharged and that there was a causal relationship between her exercise or attempt to exercise her rights under the workers' compensation statute and her discharge.[33] *See Horton v. Miller Chemical Co.*, 776 F.2d

[32] Although *Caterpillar* considered Section 301 preemption solely for purposes of determining the federal court's removal jurisdiction, that preemption analysis is equally applicable to the present case.

[33] Many States also allow relief if invocation of workers' compensation rights resulted in retaliatory conduct short of discharge. See, *e.g.*, Cal. Lab. Code § 132a (West Supp. 1987); Conn. Gen. Stat. Ann. § 31-290a (West 1987); Fla. Stat. Ann. § 440.205 (West 1981); Haw. Rev. Stat. § 378-32(2) (1985); Ill. Ann. Stat. ch. 48, ¶ 138.4(h) (Smith-Hurd 1986); Me. Rev. Stat. Ann. tit. 39, § 111 (Supp. 1987); Mass. Gen. Laws Ann. ch. 152, § 75B(2) (West Supp. 1987); Mo. Rev. Stat. § 287.780 (Vernon Supp. 1987); N.J. Stat. Ann. § 34.15-39.1 (West Supp. 1987); N.Y. Work. Comp. Law § 120 (McKinney Supp. 1987); Ohio Rev. Code Ann. § 4123.90 (Baldwin 1983); Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1987); Wash. Rev. Code Ann. § 51.48.025 (West Supp. 1987); Wis. Stat. Ann. § 102.35(2) (West Supp. 1987). Such provisions are not at issue in this case and will not be discussed herein.

1351, 1356 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1641 (1986); *Gonzalez v. Prestress Engineering*, 115 Ill. 2d at 10, 503 N.E.2d at 312; *Wolcowicz v. Intercraft Industrial Corp.*, 133 Ill. App. 3d 157, 161, 478 N.E.2d 1039, 1042 (1985).[34] Each of these purely factual questions pertains to the conduct of the employee and the motivations of the employer. None of these elements would implicate or require the state tribunal to interpret any term of an applicable collective bargaining agreement.

To defend against a retaliatory discharge claim the employer must show that it had another, nonpretex-

[34] *See also Galante v. Sandoz, Inc.*, 192 N.J. Super. 403, 407, 470 A.2d 45, 47 (1983); 2A Larson, § 68.36(c); Love at 566-78; Cooper & Westberry, *Handling Retaliatory Discharge Cases Under the Workers' Compensation Act*, 1984 Fla. Bar J. 253, 254-55 (1984) (hereinafter "Cooper").

The burden of proof varies in different States. Some require the plaintiff to prove that the exercise of workers' compensation rights was the sole factor motivating the discharge. *See, e.g., Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 736 (Tex. 1985). In others, the employee need only show that the workers' compensation claim was a "substantial" or "significant" factor in the retaliatory conduct. *See, e.g., Delano v. City of South Portland*, 405 A.2d 222, 229 (Me. 1979) ("substantial" factor); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 196-98, 347 N.W.2d 184, 190-91 (1983) ("significant" factor).

tual reason for the discharge.[35] *See Slover v. Brown*, 140 Ill. App. 3d 618, 621, 488 N.E.2d 1103, 1105 (1986); *see generally Horton v. Miller Chemical Co.*, 776 F.2d at 1359 n.11. Successful defense of the state claim, however, does not depend on the propriety of any motivation other than an intent to penalize or discourage the exercise of workers' compensation rights.[36] The employer is not asked to show that it had "just cause" for the discharge. It need only prove that it would have discharged the plaintiff for reasons unrelated to her pursuit of a workers' compensation claim.[37] This purely factual inquiry does not turn upon the meaning of any provision of a collective bargaining agreement.

The Court's focus on the liability determination as the centerpiece of Section 301 preemption analysis precludes any successful assertion that incidental questions of labor contract interpretation that arise in the remedial phase require displacement of the state law claim.[38] As explained above, Section 301 preemption analysis seeks to preserve a uniform body of federal law and displaces state tort claims that would redefine the nature of the

---

[35] See 2A Larson, § 68.36(d); Love at 578-83; Cooper at 255.

[36] State workers' compensation retaliatory discharge claims do not purport to be the exclusive remedy for all wrongful discharge claims.

[37] For example, the employer may seek to establish that the discharge was the result of the employee's excessive absenteeism or tardiness, intoxication on the job, or incompetence, or that the discharge resulted from factors independent of the individual employee such as a downturn in general business conditions.

[38] Recent cases look solely at whether "any attempt to assess *liability* [under the state tort] inevitably will involve contract interpretation." *Allis-Chalmers*, 471 U.S. at 218 (emphasis added). *See Hechler*, 107 S. Ct. at 2167 (is the state "claim" independent of the labor contract?). This focus follows naturally from the language of the statute, which governs claims for violation of labor contracts. 29 U.S.C. § 185.

obligations undertaken by the parties to the collective bargaining agreement.

The process of fashioning remedies for successful retaliatory discharge claimants, however, does not threaten to so alter the meaning of the labor contract. State policy, not the terms of the contract, determines the appropriate array of remedies, which may include, in appropriate cases, actual and punitive damages as well as reinstatement and attorney's fees.[39] Obviously, reference to the applicable labor contract may be necessary to determine the amount or extent of certain types of relief, such as back pay and reinstatement. But a court's passive reference to a collective bargaining agreement as a source of data in calculating damages or determining seniority does not threaten to redefine the obligations established by the labor contract in a manner that warrants Section 301 preemption.[40] *See Baldracchi v. Pratt*

---

[39] Much of the available relief depends upon facts and circumstances unregulated in collective bargaining contracts. For example, many States authorize punitive damages, which are measured by traditional state law standards and are not associated with any aspect of the labor contract. *E.g.*, Minn. Stat. § 176.82 (1986); *Kelsay v. Motorola*, 74 Ill. 2d at 186-88, 384 N.E.2d at 359-60; *Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931, 940 (Mo. App. 1985); *Lally v. Copygraphics*, 85 N.J. 668, 670, 428 A.2d 1317, 1318 (1981); *Webb v. Dayton Tire & Rubber Co., Division of Firestone Tire Co.*, 697 P.2d 519, 522-23 (Okla. 1985); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984); *Carnation Co. v. Borner*, 588 S.W.2d 814, 820 (Tex. Ct. App. 1979), *aff'd*, 610 S.W.2d 450 (Tex. 1980). Similarly, some States allow a plaintiff to recover for noneconomic injuries and to recoup attorneys' fees. *E.g.*, Conn. Gen. Stat. Ann. § 31-290a (West 1987); Me. Rev. Stat. Ann. tit. 39, § 111 (Supp. 1987); Mass. Gen. Laws Ann. ch. 152, § 75B(2) (West Supp. 1987); N.Y. Work. Comp. Law § 120 (McKinney Supp. 1987); *Malik v. Apex International Alloys, Inc.*, 762 F.2d 77, 81 (10th Cir. 1985) (applying Oklahoma law); *Carnation Co. v. Borner*, 588 S.W. 2d at 820.

[40] In addressing the Section 301 preemption claim at issue here, the Court need not decide whether other preemption doctrines re-

& Whitney Aircraft Division, United Technologies Corp., 814 F.2d 102, 106 (2d Cir. 1987), *petition for cert. filed*, No. 87-318 ("Determination of the extent of damages is not the sort of 'substantial dependence' on the labor agreement that mandates section 301 preemption.").

In sum, the workers' compensation retaliatory discharge claim at issue in this case differs substantially from the state law claims that this Court found preempted in *Allis-Chalmers* and *Hechler*. In those cases, the Court found that "[t]he threshold inquiry for determining if [the state law] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *Hechler*, 107 S. Ct. at 2167. Thus, in both cases "'questions of contract interpretation . . . underl[ay] any finding of tort liability.'" *Id.* at 2168 (quoting *Allis-Chalmers*, 471 U.S. at 218). Here, by contrast, the determination of liability for retaliatory discharge rests on state law principles independent of the labor contract.

---

quire state courts, in fashioning remedies for retaliatory discharge, to accommodate the collective bargaining agreement. *Cf. Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 306 (1977); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 65-66 (1966).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to remand this action to the Illinois Circuit Court.

Respectfully submitted,

JAMES E. PFANDER
CYNTHIA M. MOORE
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036-3195
(202) 466-6464
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
Suite 349
444 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the Amici Curiae*

December 11, 1987

APPENDIX A

Twenty States and the District of Columbia, by statute, authorize an employee to assert a claim against her former employer if she is discharged in retaliation for filing a workers' compensation claim:

California –Cal. Lab. Code § 132a (West Supp. 1987)

Connecticut—Conn. Gen. Stat. Ann. § 31-290a (West 1987)

District of Columbia—D.C. Code Ann. § 36-342 (1981)

Hawaii—Haw. Rev. Stat. § 378-32(2) (1985)

Louisiana—La. Rev. Stat. Ann. § 23:1361 (West 1985)

Maine—Me. Rev. Stat. Ann. tit. 39, § 111 (Supp. 1987)

Massachusetts—Mass. Gen. Laws Ann. ch. 152, § 75B(2) (West Supp. 1987)

Minnesota—Minn. Stat. § 176.82 (1986)

Missouri—Mo. Rev. Stat. § 287.780 (Vernon Supp. 1987)

Montana—Mont. Code Ann. § 39-71-317 (1987)

New Jersey—N.J. Stat. Ann. § 34.15-39.1 (West Supp. 1987)

New York—N.Y. Work. Comp. Law § 120 (McKinney Supp. 1987)

North Carolina—N.C. Gen. Stat. § 97-6.1 (1985)

Ohio—Ohio Rev. Code Ann. § 4123.90 (Baldwin 1983)

Oklahoma—Okla. Stat. Ann. tit. 85, § 5 (West Supp. 1987)

Oregon—Or. Rev. Stat. § 659.410 (1985)

South Carolina—S.C. Code Ann. § 41-1-80 (Law. Co-op 1987) (to be codified)

Texas—Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1987)

Virginia—Va. Code Ann. § 65.1-40.1 (1987)

Washington—Wash. Rev. Code Ann. § 51.48.025 (West Supp. 1987)

Wisconsin—Wis. Stat. Ann. § 102.35(2) (West Supp. 1987)

APPENDIX B

Nine States, by statute, prohibit an employer from retaliating against an employee who exercises her workers' compensation rights:

Alabama—Ala. Code § 25-5-11.1 (1986)

Arizona—Ariz. Const. art. XVIII § 3

Florida—Fla. Stat. Ann. § 440.205 (West 1981)

Illinois—Ill. Ann. Stat. ch. 48, § 138.4(h) (Smith-Hurd 1986)

Kentucky—Ky. Rev. Stat. § 342.197 (Michie Supp. 1986)

Maryland—Md. Ann. Code art. 101, § 39A(a) (1985)

Michigan—Mich. Stat. Ann. § 17.237(125) (Callaghan 1980)

Vermont—Vt. Stat. Ann. tit. 21, § 710 (Equity Supp. 1986)

West Virginia—W. Va. Code § 23-5A-1 (1985)

The courts in six of these States have recognized a private right of action by an employee who was discharged in violation of the statutory prohibition.

Florida—*Smith v. Piezo Technology & Professional Administrators*, 427 So.2d 182 (Fla. 1983).

Illinois—*Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E. 2d 353 (1978).

Kentucky—*Firestone Textile Co. Division, Firestone Tire & Rubber Co. v. Meadows*, 666 S.W. 2d 730 (Ky. 1984); *Pike v. Harold (Chubby) Baird Gate Co.*, 705 S.W.2d 947 (Ky. Ct. App. 1986).

Maryland—*Roberts v. Citicorp Diners Club, Inc.*, 597 F. Supp. 311 (D. Md. 1984); *Kern v. South Baltimore General Hospital*, 66 Md. App. 441, 504 A.2d 1154 (1986).

Michigan—*Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

West Virginia—*Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178 (W. Va. 1980).

APPENDIX C

At least five States, in the absence of a directly applicable statutory provision, have judicially recognized the tort of retaliatory discharge for filing workers' compensation claims:

Indiana—*Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

Kansas—*Murphy v. City of Topeka-Shawnee County Dept. of Labor Services*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

Nevada—*Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984).

Pennsylvania—*Butler v. Negley House, Inc.*, 20 Pa. D. & C. 3d 543 (1981); *Michelson v. Exxon Research & Engineering Co.*, 629 F. Supp. 418 (W.D. Pa. 1986), *aff'd*, 808 F.2d 1005 (3d Cir. 1987).

Tennessee—*Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984).

AMICUS CURIAE

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOANNE LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-259

JOANNE LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international labor organizations with a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in the Rules of the Court.

ARGUMENT

Introduction and Summary of Argument

This case concerns the interaction between two schemes for promoting fair employment conditions in this country both of which address a single dilemma, eloquently described by Chief Justice Taft in *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 (1921):

> A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.

One corrective response has been concerted activity:

> [L]abor organizations . . . were organized out of the necessities of the situation. . . . Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. . . [257 U.S. at 209.]

Federal statutes now protect the right of employees to join together in this manner "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," § 7 of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. § 157, and protect as well the primary focus of that joint employee activity, the collective bargaining agreement, by assuring the enforcement of such agreements under uniform federal law, § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185; *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962).

The second reaction to the plight of an individual employee in dealing with his employer has been the legislative and judicial development of norms binding on *all* employers and running to *all* employees, whether the employees have chosen to participate in the federal collective bargaining system or not. Such protections are accorded not only by federal law but by state law as well, and include the primarily state-based workers' compensation system, state and federal laws against various kinds of employment discrimination, state and federal wage and hour laws, state and federal occupational safety and

health statutes, the now exclusively federal program governing pension and employee benefit programs under the Employees' Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and, increasingly, state protections against discharges for the exercise of any of those rights, such as the protection involved in this case.[1]

As we show in Part I, *infra*, the evolution of, and the philosophy that animates, the system of public law rights protecting employees as individuals is well illustrated by the development of the state law cause of action here at issue. As we also show in Part I, this Court has in recent years made clear that this means of protecting employees in modern industrial society is not in conflict with but, instead, is complementary to the federal collective bargaining laws. Thus, as a general matter, the states, like the federal government, may establish public law minimum substantive protections for employees, as long as those protections run to all employees and not only to employees covered by collective bargaining agreements.

State laws that do regulate the collective bargaining process itself rather than provide a set of basic employee protective norms from which collective bargaining begins are, in contrast, preempted as inconsistent with federal law. Because the state law in this case does not burden the collective bargaining regime but, instead, provides minimum substantive rights to all employees as individuals, regardless of whether the employees are par-

---

[1] We note at the outset that issues pertaining to *contract based* state protections against discharges for individual employees (including wrongful discharge theories based upon implied obligations of good faith and fair dealing) may raise quite different preemption issues from those involved in this case. *See Caterpillar, Inc. v. Williams*, —— U.S. ——, 107 S. Ct. 2425, 2432 (1987). The analysis in this brief does not address those issues, and is devoted solely to the issues raised by state statutory or court-created causes of action that do *not* depend in their essence upon the existence, or the terms, of *any* private agreement, individual *or* collective.

ticipating in the federal collective bargaining system, that law is *not* preempted by the federal labor laws.

In Part IIA, *infra*, we discuss what appears to be the unarticulated thesis of the decision below: that federal law empowers unions and employers through their collective bargaining agreements to alter state minimum substantive public law rights accorded to employees as individuals. According to this thesis, through collective bargaining agreement the parties are entitled to vary either the state substantive protection itself (including the remedies available under state law for the breach of those protections), or to replace the state law judicial or administrative scheme for adjudicating those rights with a contractual arbitration system. Insofar as this thesis would permit alteration of the minimum substantive protections accorded *individual* employees under state public law, where state law makes such protections inalienable, it is flatly inconsistent with this Court's precedents. That conclusion applies not only with regard to the substantive norms imposed by state law, but also with regard to the remedies available for breach of those norms.

The question whether arbitration of workplace disputes, where the parties to a collective bargaining agreement have agreed to such arbitration, displaces the adjudicatory method prescribed by state law is conceptually a separate one. As we go on to demonstrate, in Part II B, *infra*, the federal policy favoring arbitration of workplace disputes under collectively bargained arbitration schemes pertains not to workplace disputes generally, but, to disputes concerning the group-created rights embodied in the collective bargaining agreement. For this reason, this Court has not viewed the federal policy favoring arbitration as pertinent to federally-created public law protections accorded to all employees as individuals, and has preserved the judicial remedies Congress has created for the adjudication of such rights. The same considerations govern where the protections of individual employee rights are created by the states rather than the federal government.

I. Federal Labor Policy Provides for Governance of the Workplace Both Through Inalienable Public Law Employee Protective Legislation and, Where The Majority of Employees So Choose, Through Collective Bargaining Agreements.

Illinois, like many other states,[2] has in recent years determined that in order to protect employees in that state from bearing the costs of industrial accidents and adverse health effects, it is necessary not only to legislate a state-prescribed program requiring employer compensation for such injuries, but also to assure that employees will not be subject to discharge for attempting to secure such compensation. In determining whether the federal law of collective bargaining in any respect invalidates that assurance (or any aspect of that assurance), it is instructive to begin with a detailed survey of the evolution of the Illinois cause of action for retaliatory discharge in the workers' compensation context. That examination provides a useful illustration of the conceptual underpinnings of one of the two complementary legal schemes governing labor relations in this country, and therefore provides a logical point of departure for considering the question whether state laws providing minimum substantive guarantees to individual employees are in any respect displaced by the federal collective bargaining laws.

A. Illinois, like every other state,[3] has provided for a workers' compensation program applicable to all employees in the state. As the Illinois Supreme Court has explained, "The Workmen's Compensation Act (Ill. Rev. Stat. 1973, ch. 48, par. 138.1 et seq.) substitutes an entirely new system of rights, remedies, and procedure for

---

[2] *See* list provided in the Addendum to the Brief of State of Minnesota as Amicus Curiae on Petition for Writ of Certiorari in this case.

[3] F. Harper, F. James and O. Gray, 3 *The Law of Torts* § 11.2 at 69 (2d Ed. 1986).

all previously existing common law rights and liabilities between employers and employees subject to the Act for accidental injuries or death arising out of and in the course of the employment. . . ." *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 174, 384 N.E. 2d 353, 355 (1978). The theory of that workers compensation law, the Illinois Court continued, is that

> the employee gave up his common law rights to sue his employer in tort, but recovery for injuries arising out of and in the course of his employment became automatic without regard to any fault on his part. The employer, who gave up the right to plead the numerous common law defenses, was compelled to pay, but his liability became fixed under a strict and comprehensive statutory scheme . . . . This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries. *See O'Brien v. Rautenbush* (1956), 10 Ill. 2d 167, 139 N.E. 2d 222. [*Id.*]

See also, H.G. Goelitz Co. v. Industrial Board, 278 Ill. 164, 172, 115 N.E. 855, 859 (1917) ("The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident.")

This statutory scheme, and the other similar schemes in every state, replaced a quite different common law scheme, under which workers were said to have agreed, in their individual employment contracts, to have assumed the risk of foreseeable workplace dangers; the notion, developed during the reign of laissez-faire economics, was that an employee, exercising his freedom to contract, would take into account the likely risks of a job in establishing the wages for which the employee would

agree to work, so that the costs of any injury should therefore be borne by the employee. *See generally Tiller v. Atlantic Coast R. Co.*, 318 U.S. 54, 58-64 (1943); *Hough v. Texas & P.R. Co.*, 100 U.S. 213, 217 (1880); F. Harper, F. James, & O. Gray, 4 *The Law of Torts* § 21.4 at 226-27 & n.3. (2d Ed. 1986). The state legislatures, with eventual unanimity, concluded that this contract-based solution to the distribution of the costs of industrial accidents is inconsistent with the needs of a humane industrial society:

> [T]he philosophy that underlies workers' compensation acts [views] [t]he toll of industrial accident [as] an inevitable, though reducible, cost of our industrial and economic system and compensates the victim without regard to the fault of anyone, distributing the cost of compensation among the beneficiaries of the enterprise that takes the toll. Under such a system to risks of injury are put directly on industry—there is no room for their assumption by the employee. [4 Harper, James, & Gray, *supra*, § 21.4 at 227-28.] [4]

By thus mandating that the health and safety costs of operating modern industry be accounted for in the prices charged to consumers and the profits derived by owners, the states sought to provide a competitive incentive to industrial enterprises to minimize the health and safety injuries to its working citizens. *See* A. Larson, 1 *Law of Workmen's Compensation* § 2.20 (1982); 3 Harper, James & Gray, *supra*, § 11.2 at 69.

Since workers compensation puts public law norms in the place of private agreements, employer arrangements with individual employees, express or implied, that waive or limit the rights conferred by public law have been deemed to be inconsistent with the compensation scheme. 4 Harper,

---

[4] This development of state-based workers' compensation systems was for the most part completed before the enactment of § 301 of the LMRA in 1947. *Tiller v. Atlantic Coast R. Co., supra*, 318 U.S. at 68-73 (Frankfurter, J., concurring).

James, & Gray, *supra*, § 21.6 at 253. Consequently, Illinois, like most other states, has determined that the substantive rights protected by the workers' compensation law are inalienable and that any agreement in which a covered employee purports to absolve the employer from paying the costs of industrial accidents is unenforceable. *International Coal & Mining Co. v. Industrial Commission*, 293 Ill. 524, 530, 127 N.E. 703, 705 (1920) ("It is well settled in this state that an employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with his employee.") *See also Tribune Co. v. Industrial Commission*, 290 Ill. 402, 125 N.E. 351 (1919); 4 Harper, James, & Gray, *supra*, § 21.6 at 252-53; *Restatement (Second) of Contracts*, § 195(2)(a) (1981).[5]

Illinois' inalienability rule applies not only to the substantive protections accorded by the Workers Compensation Act, both also to the procedures and remedies the Act establishes. *See, e.g., International Coal & Mining Co. v. Industrial Commission, supra*, 293 Ill. at 529-530, 127 N.E. at 705 ("where the Industrial Commission has taken jurisdiction such jurisdiction can[not] be taken from it by the action of the parties unless such action be in conformity with the act"; consequently, "where the employer is seeking to limit its liability by settlement in the nature of the lump sum payment . . . [t]his cannot be done without the approval of the Industrial Commission"); *Hartford Accident & Indemnity Co. v. Industrial Commission*, 220 Ill. 544, 546, 151 N.E. 495, 496 (1926) ("It is contrary to the spirit of the act to permit the

[5] For example, Connecticut law provides that "No contract, express or implied, no rule, regulation, or other device shall in any manner relieve any employer, in whole or in part, of any obligation created by [the workers' compensation program], except as herein set forth." Con. Gen. Stat. § 31-290. *See Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2nd Cir. 1987), pending on a pet. for cert. sub nom. *Pratt & Whitney Aircraft Div. v. Baldracchi*, No. 87-318.

parties . . . to waive the provisions of the act itself, except insofar as the act permits such waiver . . . [n]o employee, personal representative or beneficiary shall have the power to waive any provisions of the act in regard to the amount of compensation payable. . . . [P]arties may not by agreement deprive the Industrial Commission of jurisdiction.")

In recent years, however, it has become apparent that some employers were following practices that had precisely the same effect as an agreement requiring employees to assume the risks of industrial accidents. In *Kelsay, supra*, for example, the employer had an acknowledged policy forbidding its employees, upon pain of discharge, from filing claims under the state workers' compensation program. In effect, the employer was once again conditioning employment upon an agreement by employees to absorb the costs of industrial accidents, thereby exposing the employees to the risk of major medical costs and lost income and eliminating any incentive for the employer to reduce such accidents in order to remain competitive and profitable.

In *Kelsay, supra*, the Illinois Supreme Court recognized that permitting discharges of this kind is fundamentally inconsistent with the policy underlying the workers' compensation program, and announced that henceforth such discharges would be actionable as a tort and subject to the normal compensatory and punitive damages available in tort. *See also Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E. 2d 1280 (1984), cert. denied, 106 S.Ct. 278 (1985) (holding that because "the public policy against retaliatory discharges applies with equal force in both [union and at-will situations]," the same protection against retaliatory discharge for the filing of workers' compensation claims is available to employees covered by collective bargaining agreements as to at-will employees).[6]

[6] While, in Illinois, protection against discharges for the exercise of workers' compensation rights is a judicially-created rem-

As its origin would suggest, this right of redress is, as a matter of state law, "nonnegotiable," and may not "become a mere bargaining chip, capable of being waived or altered by . . . private parties." *Gonzales v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E. 2d 308, 312 (1986). The inalienability principle applies not only to the substantive rights accorded by *Kelsay*, but also to the remedial scheme established by the interaction of the state workers' compensation program and state tort law. *Gonzalez, supra*, 503 N.E. 2d at 313 ("even if the labor contract . . . recited the rights and obligations arising under the Workers' Compensation Act and expressly provided that a discharge in contravention of the Act was without 'just cause', . . . [n]either an employer or a union can strip an employee of the [remedial and procedural] protections of Illinois law by merely restating the rights and obligations that arise thereunder in a private labor agreement.")[7]

edy, enforceable in a traditional tort action, other states provide statutory causes of action for this and similar species of retaliatory discharges, some of which are enforceable in court actions and some of which require resort to the administrative body charged with enforcement of the underlying substantive protections. *See* L. Larson & P. Borowsky, *Unjust Dismissal* § 6.05 at 6-32 - 6-39 (1987); *see also id.* at 6-36 (noting that "[a]t this writing, about a third of the states have addressed the issue legislatively."). It is plain that the preemption question here does not turn upon which of these methods of prohibiting such discharges a state has chosen.

[7] As we understand *Gonzalez*, the inalienability principle applies equally to individual, and to collective, labor contracts; *viz.*, the history outlined above, as well as the unequivocal language used by the Illinois Court indicate that an agreement between an employer and an individual employee conditioning employment upon a promise not to file a workers' compensation claim in the event of an industrial injury would be invalid, and that an employee covered by such an agreement could nonetheless sue his or her employer in tort if such a discharge occurred.

The relevant labor law preemption considerations where a state, in contrast, *permits* contractual waiver by individual employees

B. The retaliatory discharge cause of action presently before this Court, then, developed as an integral aspect of perhaps the paradigm example of a public law minimum substantive protection for individual employees. And while the employer here contends only that federal law preempts the retaliatory discharge aspect of this integrated workers compensation scheme, the preemption issue here is conceptually identical to the issue posed when an employer contends that federal law preempts a basic compensation claim. Since a variant of the latter issue has been before this Court we begin there.

Collective bargaining agreements often address, and make arbitrable, an issue that overlaps with the *merits* of a workers' compensation claim. Issues of workplace safety are a common cause of workplace disputes, and are commonly covered by, and grievable under, collective bargaining agreements. Indeed, this Court held in *Gateway Coal v. United Mine Workers*, 414 U.S. 368 (1974), that the usual "'presumption of arbitrability' . . . applies to safety disputes," *id.* at 380, and commented:

> Certainly, industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent. [414 U.S. at 379.]

Thus, as this Court has noted, "presumably a host of personal injuries suffered by . . . employees are caused

of a state-law employee protection, *see, e.g., Fort Halifax Packing Co. v. Coyne*, —— U.S. ——, 107 S. Ct. 2211, 2214 (1987), are quite different, and in some respects more complex. *See* n.15, p. 21, *infra*.

by the negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery." *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, —— U.S. ——, ——, 107 S. Ct. 1410, 1415 (1987). That being so, it could well happen, as it did in *Buell*, 107 S. Ct. at 1415, that the arbitrator adjudicating the contractual grievance and the court or agency adjudicating the compensation claim would be faced with factually parallel disputes.

The employee in *Buell* was one of a group of employees who had chosen to bargain collectively under the Railway Labor Act, 45 U.S.C. § 151 et seq., and was also covered, as are all railroad employees, by the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. The FELA "provides a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." *Buell*, 107 S. Ct. at 1413.[8] In *Buell*, the railroad sought to avoid liability under the FELA by arguing that the employee's injury was due to conditions that could have been—indeed, in that case were—grieved and arbitrated under the collective bargaining agreement and that the RLA remedy negated the FELA remedy. That argument was flatly rejected:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. *See e.g., MacDonald v. West Branch*, 466 U.S. 284 . . . (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 . . . . (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 . . . (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that not withstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, 450 U.S. at 737. . . [107 S. Ct. at 1415.]

[8] The FELA differs from state workers' compensation programs in that the FELA retains the requirement that negligence be established as a basis for any recovery, and retains as well a common law adjudicatory scheme, including a jury trial. *See Tiller v. Atlantic Coast R. Co., supra.* However, the FELA's basic purposes and structure are the same as the workers' compensation programs': "to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 107 S. Ct. at 1413. And, like Illinois' workers' compensation program, the FELA "prohibits covered carriers from adopting any regulation, or entering into any contract, to limit their FELA liability." *Id.*

The Court in *Buell* thus recognized that despite the overlap in the facts likely to be adjudicated in the two fora and the circumstance that the arbitration could provide some remedy, including backpay and reinstatement, to an employee aggrieved by an injury at the workplace, the FELA "provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement." 107 S. Ct. at 1415. The Court therefore held that "[i]t is inconceivable that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a grievance under the RLA to a successful conclusion." *Id.* at 1416.

The only possible distinction between the question posed in *Buell* and the question posed by the interaction between the integrated Illinois workers compensation scheme and federal labor policy is that here it is a *state*, and not the federal government, that created the public law system that replaced the common law of torts and contracts as the means of providing compensation to workers injured in the workplace.[9] But this Court has also had recent oc-

[9] We recognize, of course, that the RLA statutory scheme differs somewhat from the statutory scheme established by the NLRA and

casion to consider whether that distinction is of any relevance to whether Congress in enacting the federal collective bargaining laws intended to displace the public law substantive employee protections the states have accorded to the employees who have chosen to participate in that collective bargaining regime as well as to the employees who have not opted for union representation. The Court has concluded that Congress had no such intent:

> The evil Congress was addressing [in enacting the NLRA] was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rate were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the

---

the LMRA for non-railroad employees, just as the FELA compensation scheme differs in certain respects from that of the typical state workers' compensation scheme. *See* n.8, *supra*. For present purposes, however, the differences between the RLA and th NLRA are not relevant. The reason is that in their essentials, both the RLA and the NLRA statutory schemes establish: statutory protections for collective employee activity; the enforceability of the resulting labor contract under federal law (*see*, on the RLA in this regard, *Machinists v. Central Airlines*, 372 U.S. 682, 691-92 (1963)); and a preference (indeed, in the RLA, a command, *see Buell*, 107 S. Ct. at 1414) for arbitrable solutions to disputes arising out of the terms and conditions of employment created through collective activity and embodied in the collective bargaining agreement. And neither the RLA nor the NLRA treats in express terms with the interrelation of the collective bargaining system and federal and state minimum substantive public law protections that run to all employees generally. Against that background this Court has consistently viewed the two statutory schemes as identical for the purpose of determining the congressional intention upon these two sets of questions concerning the interaction of different legal schemes, as the quotation in the text from *Buell*, citing two NLRA/LMRA cases (*Barrentine* and *Alexander*), indicates.

> equality of bargaining power, and state or federal legislation that imposes minimum substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly it has never been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. *See*, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737, 739. . . . *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, . . . (1974). Nor has Congress ever seen fit to exclude unionized workers from laws establishing minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards. [*Metropolitan life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754-55 (1985)] [10]

---

[10] While the Court has not yet had occasion to explore the meaning of the caveat to the general rule stated in *Metropolitan Life Ins. Co.*, we understand that caveat to cover at least three sets of circumstances:

First, where a state law places such significant legal limits on the right to negotiate on mandatory subjects of bargaining as to render that right nugatory, the state law improperly conflicts with the NLRA collective bargaining regime. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

Second, certain subjects within the scope of mandatory NLRA bargaining concern the employees as a group, and not the terms and conditions of employment of individual employees alone. These include, most obviously, no-strike clauses and the other provisions dealing with the use of economic weapons (including, we would think, the grievance arbitration clauses that are the traditional quid pro quo for no strike clauses). Also included in this category, we believe, are seniority provisions, since such provisions involve the distribution among members of the group of scarce privileges and opportunities, where equal protections *cannot* be accorded

As one would expect, exactly the same lesson is taught by the three recent cases concerning the circumstances in which a state cause of action is displaced § 301 of the LMRA (more precisely, by the federal, judicially-developed law governing the interpretation and application of the collective bargaining agreements that are the end result of the bargaining process protected and governed by the NLRA).[11] *Allis-Chalmers v. Lueck*,

to all employees. To allow the state to regulate such issues in the guise of protecting the employees as indiivduals would divide the employees from each other, and weaken rather than strengthen their collective bargaining power.

Third, as *Metropolitan Life* itself stressed repeatedly, because the overall goal of the NLRA is to protect employees, *not* employers, only *minimum*, not maximum, terms and conditions of employment may be set by public law. In some instances, public laws that purports to set minimum employment conditions for some individuals will set maximum conditions for others; again, seniority (or merit) systems are an example.

[11] It is worth recalling, because the court below seemed entirely to forget, that § 301 is, in terms, a provision, establishing jurisdiction in the federal courts over "[s]uits for violation of contracts between an employer and al bor organization representing employees." This Court, to be sure, in *Lincoln Mills supra*, and *Lucas Flour, supra*, construed § 301 to include as well an edict that uniform federal common law should govern the interpretation and application of labor contracts. It remains true, however, that the federal common law erected by the statute in the main has no substantive content and simply establishes rules for interpreting the intent of the private parties who entered into the collective bargaining agreement. Thus, for example, neither § 301 as such nor the common law developed under § 301 requires that the parties to a collective bargaining agreement regulate discharges at all, or regulate discharges more than, or instead of, health and safety conditions.. Nor is there any federal law created by § 301 *mandating* the arbitration of any labor disputes. In short, while the federal common law of contracts may indeed influence the conclusion reached about the parties' intent, that common law does not alter the fact that the regime established by the federal collective bargaining system is one of infinitely variable private agreements, always traceable in the end to the intent of the parties to the contract and not to public law substantive rules.

471 U.S. 202 (1985); *International Brotherhood of Electrical Workers v. Hechler*, —— U.S. ——, 107 S. Ct. 2161 (1987); *Caterpillar Inc. v. Williams*, —— U.S. ——, 107 S. Ct. 2425 (1987). Those cases delineate the circumstances in which the federal common law governing the interpretation of collective bargaining agreements will displace state causes of action that are not in terms actions for breach of contract, but that nonetheless are "derive[d] from the contract" and "purport[] to give life to [the contract] terms." *Allis Chalmers, supra*, 471 U.S. at 218-19. While holding such causes of action preempted, the Court took care to emphasize that:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavored. Clearly, § 301 does not grant parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. [471 U.S. at 211-12].

See also Caterpillar, supra, 107 S. Ct. at 2432 ("claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by § 301.")[12]

[12] *Caterpillar* primarily concerned the removal jurisdiction of the federal courts in the context of a suit involving various labor

Thus, Congress did not intend either the statutory law governing the collective bargaining relationship or the common law governing the resulting collective bargaining agreement, to displace the partially parallel set of "nonnegotiable . . . [state law] rights . . . independent of any right established by contract," *Allis Chalmers, supra,* 471 U.S. at 213, any more than Congress intended to invalidate—or to permit the parties by private contract to alter—such independent federal law rights. Consequently, just as the employee in *Buell* did not lose his FELA rights by reason of the health and safety protections accorded by a collective bargaining agreement, so an employee in Illinois does not lose his inalienable right to workers' compensation for an industrial accident because his union has negotiated contractual protections concerning such injuries or their prevention.[13]

---

law preemption issues. In the course of deciding that jurisdictional question, however, this Court had to determine whether or not the plaintiff's claim in that case was such that the law governing the claim was necessarily federal law; if so, the case would be removable as one arising under federal law. Consequently, while *Caterpillar* did not ultimately resolve the question whether *any* form of labor law preemption might prevent plaintiffs lawsuit from going forward, 107 S. Ct. at 2433 n.13, that decision does establish that the source of any such preemption is not the rule, embodied in § 301, that the interpretation and application of collective bargaining agreements is governed exclusively by federal common law.

[13] We note that there will often be instances in which, in the course of adjudicating a state workers' compensation claim, some issue that requires interpretation of a collective bargaining agreement will arise.

This is most like to occur in the remedy phase: For example, in determining an individual's wage rate for purposes of calculating the compensation due, the collective agreement will have to be consulted. *See Baldracchi v. Pratt & Whitney, supra.* In addition, where questions arise as to whether or when a claimant is ready to return to work, collective bargaining agreement provisions may become pertinent.

Another example is provided by the state employee protective legislation upheld in *Fort Halifax, supra.* That legislation pro-

The same result obtains with respect to the tort of retaliatory discharge for the exercise of workers' compensation rights directly involved in this case. That tort, as we have seen, is simply one way in which Illinois endeavors to maintain the right of employees to untrammeled access to the public law compensation system. The relationship between a contractual remedy for a discharge lacking "just cause" and the public law protection against retaliation for invoking statutory rights is precisely the same as the relationship between the contract right and the FELA cause of action in *Buell*: In both instances, *the employee would have had precisely the same statutory rights had there been no collective bargaining agreement at all, and would have had*

---

vided for severance pay to employees of one week's pay for each year of employment in the event of a plant closing. Where (as in *Fort Halifax* itself) the plan is one covered by a collective bargaining agreement, an employee's pay rate will be determined by that agreement.

Similarly, adjudications under other state law employee protective schemes may involve interpretation of collective bargaining agreements as part of resolving the public law dispute. Thus, a state claim that an individual was discriminated against on some basis forbidden by state law (such as sex, marital status or disability) will ordinarily involve allegations of unequal treatment as to some particular term of employment. In order to decide whether there has been discrimination, it may well be necessary to consult the collective bargaining agreement to determine what the contract provides as to those terms of employment.

The critical point for present purposes, we submit, is that in each of these instances, the cause of action is rooted not in any private contract but in public law; the collective bargaining agreement is relevant not as a source of law but essentially as evidence relevant to a certain factual predicate for recovery. That being so, the *Allis-Chalmers* decision does not preempt a state law cause of action where collective bargaining agreement interpretations are involved in the state law litigation in this secondary way, although of course federal common law would govern the actual contract interpretation questions. *See Allis-Chalmers, supra,* 471 U.S. at 213, n.8.

those rights even if the arbitrator had concluded that under the agreement the employer had committed no violation of the contract norms and that no contract remedy was due. And *Buell* makes it plain that where such entirely independent, alternative remedies and alternative procedures are made available to an employee for a single injury, the employee is free to choose either one.

II. The Substantive Standards, Remedies, and Procedures Provided By Public Law Employee Protection Law May Not Be Varied By the Parties to Collective Bargaining Agreements.

A. The decision below may perhaps be explained as grounded on the premise that parties to a collective bargaining agreement who agree to a "just cause" discharge protection, and to a grievance/arbitration system, intend thereby to vary the applicable minimum employee protection public law standards, remedies and procedures, and to bind covered employees to use the contractual standards, remedies, and procedures, and none other, and that the parties intent in this regard should be honored. *See* 823 F.2d at 1048; *see also, e.g., Stallcop v. Kaiser Fuundation Hospitals*, 820 F.2d 1044 (9th Cir. 1987) (state tort is preempted as long as the collective bargaining agreement appears to provide the same job security that the state provides as a matter of public low for nonunion employees).[14]

[14] That approach, in effect, reads a "just cause" protection in a collective bargaining agreement as: (1) waiving the employees' state and federal substantive protections, if any, not to be discharged for certain specified reasons, and substituting for those protections an arbitrator's determination whether a certain cause for discharge is "just" or not; (2) affirmatively *authorizing* the employer to make discharge determined to be for "just cause" within the meaning of the contract; (3) waiving the employees' state and federal claims, if any, to compensatory and punitive damages in the event of a discharge that is contrary to public law; and (4) waiving the employees' state and federal rights to a court or administrative proceeding to vindicate the employee's public law rights.

For the most part, the "waiver" thesis is simply a somewhat more coherent way of restating the argument that contractual and statutory rights are inherently mutually exclusive, an argument we discussed at length in Part I, *supra*. As we have shown, a fundamental purpose of public law minimum substantive employee protections such as the one here is to *remove* certain issues of workplace governance from the private decisionmaking process entirely, and to make those protections nonnegotiable. Thus, it does not matter whether the source of the demise of the state law is claimed to be the federal laws governing collective bargaining standing alone or the specific intent of the parties negotiating collective bargaining agreements. In either event, the decision of the government entity that creates a public law employee protection as to whether that protection is inalienable or not is binding on the parties to any contract, including a collective bargaining agreement. See pp. 11-19, *supra*.[15]

[15] We believe that where (as in *Fort Halifax, supra*) a state determines that a state public law right *is* generally waivable by contract, then two questions which are governed by federal and not state law arise:

First, may that right be waived by the employee's collective bargaining representative, or must tht right be waived by the employee individually? Because it is federal law that establishes and governs the system of exclusive representation, it is our view that it is for the federal government, and not the states, to decide when unions may act for individuals with respect to aspects of the employment relationship that are grounded in public law rather than in a collective bargaining agreement.

Second, and similarly, issues will often arise as to whether it was in fact the intent of the union to waive an otherwise applicable protection for individuals, where that protection is waivable. That question of contract interpretation is of course governed by § 301. *Allis Chalmers, supra*. Consequently, federal rather than state rules of how clear the waiver has to be would govern. *Cf. Metropolitan Edison* v. *NLRB*, 460 U.S. 693, 706-07 (1983). We would think that the "clear and unmistakable evidence of an intent to waive the individual rights of members" standard used in *Metropolitan Edison* to govern the waiver of rights created by the NLRA would, at a minimum, govern.

Nor does the inalienability principle apply with any less force where there is some overlap in the substantive protections accorded under the contract and under the public law system, as there is here. A general contractual protection against discharge without "just cause" neither points the arbitrator construing the contract to any particular considerations in determining the content of that protection nor suggests that public law considerations, rather than the production needs of the particular employer, shall be the governing consideration. As a result, it is not only possible, but probable, that there will be substantial divergence in the results reached between the state law judicial or administrative adjudications of retaliatory discharge cases and arbitrations concerning the same factual circumstances under "just cause" provisions. Plainly, an individual whose claim is governed by a different legal standard than that prescribed by state law has in great measure been denied his state law right. Thus, as we have seen, this Court has made it plain that the contracting parties may not, consistently with the inalienability principle, substitute a contractually established substantive standard for that imposed by public law.

The question whether the parties may affirmatively incorporate state law employee protections into their collective bargaining agreement or expressly agree to arbitration while contractually limiting the remedies available as part of the public law scheme yields the same result. As this Court stressed in *Buell*, the remedies available, for example, under a statutory scheme designed to provide compensation for injuries is in some ways the most important aspect of the public law protection. 107 S. Ct. at 1415 ("The FELA . . . . affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through [arbitration].") Indeed, the Illinois courts, in developing the tort here at issue, placed particular stress on the need to provide punitive damages in order to deter employer actions that

undermine the integrity of the workers' compensation scheme. *Midgett, supra*; *Gonzales, supra.* Thus, denying punitive damages to employees covered by the collective bargaining ssytem would be substantially to lessen the degree of substantive protection available to shield those employees from pressure by their employers to forego the compensation due under state law, as well as greatly to diminish the amount of any monetary recovery. Those considerations bring the state law remedies here fully within the inalienability principle, and preclude the parties to a collective bargaining agreement from working such a change in the public law rights of individual employees.

B. The question remains whether the parties to a collective bargaining agreement could, while preserving applicable statutory standards and remedies, agree to arbitarte rather than litigate wrongful discharge claims generally, or certain wrongful discharge claims particularly. There is, of course, a strong policy favoring the arbitration of labor-management disputes, embodied in § 203(d) of the LMRA and in the *Steelworkers Trilogy* (*Steelworkers v. Enterprise Wheel & Carriage Corp.*, 363 U.S. 593, 597 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)) and its progeny.[16]

---

[16] In recent years, outside the labor management relations area, this Court has recognized a congressional intent to provide for the enforcement of agreements to arbitrate public law issues, including state public law issues. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, —— U.S. ——, 107 S. Ct. 2332 (1987). All three of the cited cases involved application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. It bears noting that there is an explicit exception to the Arbitration Act for employment contracts. 9 U.S.C. § 1. Thus, nothing in the cases cited has any direct application to the question before the Court here.

We do not believe that this presumption favoring the enforcement of labor arbitration provisions has any force in the present context. In the first place, the federal labor policy favoring arbitration is limited to disputes concerning the majoritan decisionmaking process embodied in the collective bargaining agreement. Section 203(d) of the LMRA, in terms, prefers contractually-established dispute resolution mechanisms as "the desirable method" only "for the settlement of grievance disputes arising over the application and interpretation of an existing collective bargaining agreement", and not for public-law based disputes.[17] And the *Steelworkers Trilogy* as well stressed that the policy favoring arbitration

> is confined to interpretation and application of the collective bargaining agreement; [the arbitrator] does not sit to dispense his own brand of industrial justice. [The arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. [*Steelworkers v. Enterprise Wheel, supra,* 363 U.S. at 597.]

Thus, many labor arbitrators see public law issues as beyond their ken, and refuse to adjudicate such issues even when asked to do so by the parties. *See Darr v. NLRB*, 801 F.2d 1404 (D.C. Cir. 1986) (arbitrator "saw the NLRB and the courts as ultimately charged with the enforcement of public rights, and arbitrators as responsible for applying labor agreements to determine private rights", and issued an award that he knew to be contrary to the NLRB but that he believed effectuated the intent of the parties.) *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

---

[17] The language of the Federal Arbitration Act, interestingly enough, is considerably broader. That Act covers controversies "arising out of" either the "contract" or the underlying "transaction", as well as any controversy involving "the refusal to perform the whole or any part thereof [of the contract or transaction]." 9 U.S.C. § 2.

This limitation on the scope of the presumption favoring labor arbitration has its roots in the fact that the commitment to arbitrate contained in collective bargaining agreements is made by the group, but is binding upon each of the covered individual employees. *Republic Steel Corp. v. Maddox*, 379 U.S. 335 (1965). This commitment makes eminently good sense where the employment rights being arbitrated are themselves the product of the contract; in effect, the substantive employment right was from its origin combined with a commitment to arbitrate, so that the individual upon whom the right was conferred has no basis for claiming that the substantive right should be enforceable in the individual's suit in court. But where the collective agreement to arbitrate purports to reach public law rights not rooted in the contract, quite different considerations come into play as this Court forcefully emphasized in *Alexander v. Gardner-Denver, supra*:

> We are unable to accept the proposition that petitioner waived his cause of action under Title VII [by pursuing an arbitration remedy under the collective agreement.] . . . It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds; it concerns not majoritarian processes but an individual's right to equal employment opportunities. . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congression purpose behind Title VII. [415 U.S. at 51].

Consequently, while the presumption favoring labor arbitration is an extremely broad one, that presumption has force only with regard to rights that are the fruits of the majoritarian decisionmaking process fostered by the collective bargaining system.

What has been said thus far shows that the "clear and unmistakable" evidence standard used to judge the purported waiver of the NLRA § 7 statutory rights of employees, *Metropolitan Edison*, *supra*, 460 U.S. at 706-07, applies as well in a case like this one. Judged by that test—or, indeed, probably by any other—the fairly typical arbitration clause in this case, agreeing to submit to arbitration disputes about "the effect, interpretation, application, claim of breach, or violation of this Agreement," would not constitute a promise to decide the rights of individual employees under the Illinois workers' compensation scheme in arbitration.

We believe, moreover, that this Court's decisions, in fact, support the broader proposition that the federal collective bargaining laws do not empower unions and employers to make an arbitration clause in a collective bargaining agreement binding on an employee seeking to vindicate state workers compensation or retaliatory discharge rights no matter what the parties' intent in this regard may be. That, after all, was the conclusion of *Alexander v. Gardner-Denver*, of *Buell* (and of every case in between) that has addressed the question as it pertains to minimum substantive employee protections created by federal law. And, as we have seen, there is no federal labor policy principle according greater dignity to federal, than to *state*, laws providing minimum substantive protections to employees. Thus, those cases are compelling precedent for recognition of the validity of Illinois' rule against the alienation of the procedural rights granted by its workers' compensation scheme.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

AMICUS CURIAE

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

October Term, 1987

JONNA R. LINGLE,

Petitioner,

vs.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AND SIXTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
STEVEN M. GUNN
Assistant Attorney General
Counsel of Record
520 Lafayette Road
St. Paul, Minnesota 55155
(612) 296-6839
Attorneys for State of Minnesota

SCOTT R. STRAND
Assistant
Attorney General
Of Counsel

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

Of Counsel:

Joseph I. Lieberman
Attorney General of Connecticut

Warren Price, III
Attorney General of Hawaii

Neil F. Hartigan
Attorney General of Illinois

David L. Armstrong
Attorney General of Kentucky

James E. Tierney
Attorney General of Maine

William L. Webster
Attorney General of Missouri

Robert M. Spire
Attorney General of Nebraska

W. Cary Edwards
Attorney General of New Jersey

Hal Stratton
Attorney General of New Mexico

Anthony J. Celebrezze
Attorney General of Ohio

Dave Frohnmayer
Attorney General of Oregon

Jim Mattox
Attorney General of Texas

Jeffrey L. Amestoy
Attorney General of Vermont

Kenneth O. Eikenberry
Attorney General of Washington

Charles G. Brown
Attorney General of West Virginia

Donald J. Hanaway
Attorney General of Wisconsin

QUESTION PRESENTED

Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the states' workers' compensation program, simply because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-259

JONNA R. LINGLE,

Petitioner,

vs.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AND SIXTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

At least thirty states prohibit employers from discharging or otherwise discriminating against their employees, union or nonunion, for filing workers' compensation claims.[1] In addition, at least thirty-four states now permit employees to sue their employers in tort or in contract if their discharges vio-

[1] See attached addendum for a list of state workers' compensation retaliatory discharge laws.

I. Section 301 Does Not Preempt Employees' Retaliatory Discharge Claims Under State Law Because Those Claims Enforce Statutory And Common-Law Rights Independent Of Any Collective Bargaining Agreement.

The court below held that, even if employees have a private cause of action for retaliatory discharge under state law, any such claim is preempted by section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. Section 301 gives the federal courts subject-matter jurisdiction over suits for violations of collective bargaining agreements[3] and it requires that the courts apply federal common law to determine the meaning of these agreements. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). As a general rule, that federal common law requires that claims that a collective bargaining agreement has been violated be submitted to the grievance arbitration process and not be decided by the courts. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). On that basis, the court below held that the employee in this case should be compelled to submit her wrongful discharge claim to arbitration and should not be permitted to seek relief in court.

---

[3] Section 301 of the LMRA provides in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

This Court, however, has not hesitated to back away from its endorsement of arbitration whenever employees seek to enforce statutes guaranteeing them specific substantive rights. In those situations, the Court has invariably held that employees have a right to bring their claims in court, and do not have to resort to the grievance-arbitration process.

The leading case is *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, an employee claimed that he had been discharged because of his race. He filed a grievance under his collective bargaining agreement, but the arbitrator found that he had been discharged for just cause. The plaintiff then filed suit under Title VII of the Civil Rights Act of 1964. Citing the doctrines of waiver and election of remedies and the federal policy favoring the arbitration of labor disputes, the employer contended that the arbitrator's award had resolved the matter and that the plaintiff should not be permitted to litigate the same discharge in another forum.

The Supreme Court disagreed. As the Court held:

> In filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not violated merely because both were violated as a result of the same factual occurrence.

Id. at 49-50. The Court further concluded that a union agreement containing a broad arbitration clause like the one in this case[4] could not constitute a waiver of the right of in-

---

[4] In *Alexander*, the applicable collective bargaining agreement contained a no-discrimination clause, an explicit "just cause" provision, and an arbitration clause covering all "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant."

dividual employees to press their Title VII claims in federal court. According to the Court, Title VII "concerns not majoritarian process, but an individual's right to equal employment opportunities."

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.

Id. at 50. The Court also made it clear that it did not matter if the employee had ever filed a grievance; he, at all times, retained the right to take his case to federal court and receive a *de novo* determination of his claim. *Id.*

This Court extended the *Alexander* rationale to Fair Labor Standards Act (FLSA) claims in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and then to claims under 42 U.S.C. § 1983 challenging discharges in retaliation for the exercise of First Amendment activity in *McDonald v. City of West Branch*, 466 U.S. 284 (1984). In each case, the Court recognized the independence of the statutory right from any contractual commitments and emphasized the importance of maintaining access to the judicial forum.

The fact that the statutory rights in *Alexander*, *Barrentine*, and *McDonald*, were created by federal rather than state statutes does not diminish the force of the reasoning in those cases. This Court has repeatedly recognized that, like Congress, the states are free to enact substantive, nonwaivable labor standards that apply whether or not there is a collective bargaining agreement in the picture. Those state labor standards provisions are not subject to section 301 preemption. This Court flatly rejected that suggestion in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), the case relied upon by the court below.

In *Allis-Chalmers*, the Court held that a lawsuit alleging a state-law tort of bad-faith handling of an insurance claim by an employer was preempted by section 301. The plaintiff, an employee of Allis-Chalmers, was covered by a collective bargaining agreement that provided for payment of insurance benefits for nonoccupational injuries. Plaintiff suffered a nonoccupational injury, and received benefits, but claimed that Allis-Chalmers acted in bad faith by periodically ordering the insurance company to cut off his benefits. Instead of filing a grievance under the collective bargaining agreement, however, plaintiff sued in state court.

The Court concluded that the plaintiff's claim was dependent on the terms of the collective bargaining agreement. First of all, it would require an interpretation of the labor agreement to determine "whether there was an obligation . . . to provide the payments in a timely manner" on the part of Allis-Chalmers. Furthermore, "if the arbitrator ruled that the agreement did *not* provide [relief for improper payment of benefits], that too should end the dispute, for under Wisconsin law there is nothing that suggests that it is not within the power of the parties to determine what would constitute 'reasonable' performance of their obligations under an insurance contract." 471 U.S. at 215-16. Consequently, the Court concluded that the insurance tort alleged in *Allis-Chalmers* "not only derive[d] from the contract, but [was] defined by the contractual obligation of good faith." Since the state-law claim therefore depended on the labor agreement, section 301 preemption was required.

The Court, however, then took great care to distinguish state-law claims that do not depend on the labor agreement.

As the Court pointed out:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private labor agreements the force of federal law, ousting any inconsistent state regulation. Such a rule would delegate to unions and unionized employers the power to exempt themselves from whatever labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id. at 212. Since *Allis-Chalmers*, this Court has recognized the right of the states to substantively regulate the terms and conditions of employment on at least three occasions. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court upheld against a preemption challenge a Massachusetts law requiring health insurance carriers to provide a minimum level of mental health coverage. The employers argued that, under federal labor law, unions and employers should be entitled to make their own decisions about insurance coverage and therefore, the state regulation should not be enforced in the unionized setting. This Court unambiguously rejected that argument. As the Court pointed out:

> Minimum state labor standards affect union and nonunion employees equally and neither encourage nor discourage the collective bargaining process. . . . [Such]

> laws are in part designed to give specific minimum protections to *individual* workers and to ensure that each employee covered . . . would receive the mandated [protection].

Id. at 756. To permit employees and unions to alter state minimum labor standards would conflict with federal labor policy generally:

> It would further few of the purposes of the Act to allow unions and employees to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employees the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers v. Lueck*, 471 U.S. at 212. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employers.

Id. The Court reached the same conclusion in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ——, 107 S.Ct. 2211, 96 L.Ed. 2d 1 (1987) when it upheld Maine's plant closing/severance pay statute. In *Fort Halifax*, the Court reaffirmed *Metropolitan Life* and characterized state minimum labor standards as the "backdrop" for collective negotiations. Finally, in *Caterpillar, Inc. v. Williams*, 482 U.S. ——, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), the Court allowed a group of discharged employees to assert state-law claims based on alleged individual employment contracts, even though the employees were covered by a collective bargaining agreement. The Court reiterated the *Allis-Chalmers* holding that Congress did not intend section 301 to preempt "state rules that proscribe

conduct, or establish rights and obligations, independent of a labor contract," 96 L.Ed.2d at 329, quoting *Allis-Chalmers*, 471 U.S. at 212, and held that, even though the employees could arguably have brought suit under section 301 to get their jobs back, their claims under state contract law were not "substantially dependent" upon interpretation of the collective bargaining agreement. As the Court reasoned, even if the employees did not have a right to keep their jobs under the collective bargaining agreement, that determination would have no effect on the validity of their state individual contract claims.

This Court in both *Allis-Chalmers* and in *Caterpillar* directed that, whenever section 301 preemption is claimed, the inquiry must focus on whether the state law in question "confers non-negotiable state law rights on employees independent of any right established by contract" or whether the state law "purports to define the meaning of the contract relationship." 471 U.S. at 212. Only in the latter instance is the state-law claim preempted.

Using that standard, the proper result in this case should be plain. State retaliatory discharge laws protect all employees *individually*, independent of any employment terms established by collective bargaining agreements. The right to be free from retaliation for filing workers' compensation claims is enjoyed by all employees, no matter what they and their employer may have negotiated.

In this case, the employees' claim that their employer retaliated against them for filing a workers' compensation claim does not turn on any particular interpretation of their labor agreement. If this case is remanded for trial, the employee will have to present a prima facie case that she was, in fact, fired for filing a workers' compensation claim. In defense, the employer will have to demonstrate that the employee was

fired for another, non-pretextual reason. They will have to prove that their reason is not pretextual, but they will not have to prove, in addition, that those reasons would amount to "just cause" under an arbitrator's interpretation of their particular collective bargaining agreement. Consequently, the court does not need to construe any "just cause" requirement implied in the labor agreement to make a decision on the retaliatory discharge claim, and there is, therefore, no reason for preemption.

The state-law cause of action for retaliatory discharge depends only on the noncontractual protections of the law; it in no way "purports to define the meaning of [any] contract relationship," 471 U.S. at 212, nor does it involve any "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." *Id.* at 211; *see also, Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). Since the right to be free from retaliation for filing workers' compensation claims and the remedy for infringements of that right are truly independent of the existence or terms of any collective bargaining agreement, this Court should hold that it should not be preempted by section 301.

II. Section 301 Should Not Preempt This Suit Because Arbitration Is An Inadequate Forum To Enforce The Right Employees Have Not To Be Discriminated Against For Filing Workers' Compensation Claims.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), this Court identified five reasons why arbitration is an inadequate forum for the enforcement of employees' statutory rights. Every one of these concerns applies here.

First of all, arbitrators' expertise "pertains primarily to the law of the shop, not the law of the land." *McDonald*, 466 U.S. at 290; *Alexander*, 415 U.S. at 57. Many arbitrators are not lawyers, many of the advocates in arbitration proceedings, particularly on the union side, are not lawyers, and many of them do not possess the expertise needed to resolve the complex legal issues that can arise under these statutes. *Id.* An arbitrator considering claims similar to those raised by the employee in this case may well not have the legal expertise necessary to resolve the complex legal questions that might arise. Whether they be issues as to the proper allocation of the burden of proof or questions about the appropriate legal standard for decision, the legal issues presented by these cases might well be beyond the reach of an arbitrator versed only in the "law of the shop."

Second, since arbitrators' authority derives solely from the contract, they may not have authority to enforce the statutory rights. If an arbitrator rests a decision on his or her view of enacted legislation rather than on an interpretation of the collective bargaining agreement, the decision will not be entitled to enforcement. *McDonald*, 466 U.S. at 290-91; *Barrentine*, 450 U.S. at 744; *Alexander*, 415 U.S. at 53. Here, a judge deciding a retaliatory discharge claim can properly consider whether the public policies favoring compensation for injured workers will be frustrated if the employee's discharge is allowed to stand. If, on the other hand, arbitrators based their awards on similar broad notions of public policy, they would likely be exceeding their powers under the applicable collective bargaining agreement.

Third, unions normally have exclusive control over the "manner and extent to which an individual grievance is presented." *McDonald*, 466 U.S. at 291; *Barrentine*, 450 U.S. at 742; *Alexander*, 415 U.S. at 58 n.19. Since the collective interests of the union and individual interests of the employee are not necessarily identical or even compatible, there is a risk that individual rights may be lost because it is not in the collective interest to press an individual's claim vigorously. Often employees will seek assistance from their union but will be advised that there is little the union can do for them. That advice may be based on the union's realistic assessment that their collective bargaining agreement does not offer much protection to employees who are unfairly discharged. Conceivably, however, that advice can be based on the union's assessment that it would not be in the best interests of the membership as a whole to direct scarce resources to a vigorous prosecution of the claims of an individual employee. In either situation, the public interest in seeing that employees are not discouraged from asserting their rights is lost.

Fourth, arbitral factfinding is generally not as good as judicial factfinding. As the Court noted in *Alexander*:

> The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. [Citations omitted.] And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award."

Whatever kind of factfinding is typical of arbitrators under this collective bargaining agreement, it is quite likely that most arbitration processes will not afford the parties the same procedural protections that are afforded by state courts. Unions and employers generally intend arbitration to be an informal, expedited process for resolving disputes, and they are less concerned with ensuring that the factfinding is as accurate as the courts would insist.

Finally fifth, arbitrators rarely have the same remedial authority that the courts possess. An arbitrator might be able to award reinstatement and back pay, but an arbitrator will rarely be given authority to order broad injunctive relief, notice remedies, compensatory damages, punitive damages, or attorney fees. Consequently, arbitrators may not be able to provide complete relief. *Barrentine*, 450 U.S. at 744-45. This case clearly illustrates the problem. Illinois law permits an award of punitive charges in retaliatory discharge cases, but the arbitrator involved in the case did not have the authority to grant such a remedy. In Minnesota, the anti-retaliation provision of the workers' compensation statute, Minn. Stat. § 176.82 (1986), provides for:

> Damages incurred by the employee including any diminution in workers' compensation benefits caused by a violation of this section including costs and reasonable attorney fees, and for punitive damages not to exceed three times the amount of any compensation benefit to which the employee is entitled.

Very few arbitrators are given that kind of remedial authority. Consequently, there is a real danger that these statutory rights will be sacrificed if these cases must be submitted to arbitration.

If the decision below is affirmed, unrepresented employees will have access to legally-trained decisionmakers with broad remedial authority, but represented employees will not. The same Congress that encourages and protects employee unionization will be held to have also intended to take away the substantive state-law rights of those same employees. That result is contrary not only to the law but to the sound public policies behind the National Labor Relations Act (NLRA).

CONCLUSION

This Court has long recognized the authority of the States to substantively regulate wages and working conditions. The majority of states have now exercised that traditional police power to protect employees from discharges that contravene public policy.

The decision of the court below would sacrifice those compelling state interests on the altar of the grievance-arbitration process. Yet, as this Court has repeatedly emphasized, arbitration's value as a dispute-resolution procedure is limited to controversies arising out of collective bargaining agreements. When independent, substantive employee rights are at stake, the states need to be free to provide employees, union and nonunion alike, with whatever protections and remedies they think appropriate.

For the above-stated reasons, the amici states respectfully request that the decision below be reversed.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
STEVEN M. GUNN
Assistant Attorney General
Council of Record
520 Lafayette Road
St. Paul, Minnesota 55155
(612) 296-7960
Attorneys for State of Minnesota

SCOTT R. STRAND
Assistant
Attorney General
Of Counsel

ADDENDUM

At least twenty-five states have, by statute or constitution, prohibited employers from retaliating against their employees for filing worker's compensation claims:

Arizona—Ariz. Const. art. 18 § 3;

California—Cal. Lab. Code § 132a (West Supp. 1987);

Connecticut—Conn. Gen. Stat. § 31-290a (1987);

Florida—Fla. Stat. § 440.205 (1985);

Hawaii—Haw. Rev. Stat. § 378-32(2) (1985);

Kentucky—Ky. Rev. Stat. § 342.197 (Supp. 1987);

Louisiana—La. Rev. Stat. Ann. § 23:1361 (West 1983);

Maine—Me. Rev. Stat. Ann. Tit. 39, § 111 (West Supp. 1985);

Maryland—Md. Code Ann. art. 101, § 39A(a) (Michie 1985);

Massachusetts—Mass. Gen. Laws Ann. ch. 152, § 75B(2) (Law Co-op. Supp. 1987);

Minnesota—Minn. Stat. § 176.82 (1986);

Missouri—Mo. Rev. Stat. § 287.780 (1986);

New Jersey—N.J. Stat. Ann. § 34.15 - 39.1 (West Supp. 1987);

New York—N.Y. Work. Comp. Law § 120 (McKinney Supp. 1987);

North Carolina—N.C. Gen. Stat. § 97-6.1 (Michie 1985);

Ohio—Ohio Rev. Code Ann. § 4123.90 (Anderson 1980);

Oklahoma—Okla. Stat. Ann. tit. 85, § 5 (West Supp. 1987);

Oregon—Or. Rev. Stat. § 659.410 (1985);

South Carolina—S.C. Code Ann. § ———— (Law. Co-op 1987) (to be codified);

Texas—Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon 1987);

Vermont—Vt. Stat. Ann. tit. 21, § 710 (1985);

Virginia—Va. Code Ann. § 65.1-40.1 (1987);

Washington—Wash. Rev. Code § 51.48.025 (1985);

West Virginia—W.Va. Code § 23-5A-1 (Michie 1985);

Wisconsin—Wis. Stat. § 102.35(2) (1985-86).

At least six other states have judicially recognized the tort of retaliatory discharge for filing workers' compensation claims:

Illinois—Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978);

Indiana—Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973);

Kansas—Murphy v. City of Topeka-Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981);

Michigan—Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976);

Nevada—Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984);

Tennessee—Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

Courts in the following states have allowed employees to bring retaliatory discharge claims based on "public policy" tort or contract theories.

Alaska—Knight v. American Guard-Alert, Inc., 714 P.2d 788 (Alaska 1986);

Arizona—Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ariz. App. 1977);

Arkansas—Schottes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1982); Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984);

California—Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980);

Connecticut—Sheets v. Tedding's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980);

D.C.—Newman v. Legal Services Corp., 628 F.Supp. 535 (D.D.C. 1986);

Hawaii—Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982);

Idaho—Jackson v. Minidoka Irrig. Dist., 98 Idaho 330, 563 P.2d 54 (1977);

Illinois—Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981);

Indiana—Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973);

Kansas—Murphy v. Topeka-Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981);

Kentucky—Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983);

Louisiana—Gil v. Metal Service Corp., 412 So.2d 706 (La. App. 4th Cir.) *cert. denied*, 414 So.2d 379 (1982);

Maryland—Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981);

Massachusetts—Cort. v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982);

Michigan—Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976);

Minnesota—Phipps v. Clark Oil Co., 408 N.W.2d 569 (Minn. 1987);

Missouri—Henderson v. St. Louis Housing Authority, 605 S.W.2d 800 (Mo. App. 1979);

Montana—Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980);

Nevada—Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984);

New Hampshire—Cloutier v. Great Atlantic & Pacific Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981);

New Jersey—Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980);

New Mexico—Zuriga v. Sears, Roebuck & Co., 100 N.M. 414, 671 P.2d 662 (N.M. App. 1983);

North Carolina—Sides v. Duke Hospital, 74 N.C. App. 331, 308 S.E.2d 818 (1985);

Ohio—Lovorn v. Dayco Corp., 101 Lab. Gas (CCH) ¶55482 (Ohio CP 1984);

Oregon—Holmen v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984);

Pennsylvania—Geary v. U.S. Steel Co., 456 Pa. 171, 319 A.2d 174 (1974);

South Carolina—Ludwick v. This Minute of Carolina, Inc., 287 S.C. 284, 278 S.E.2d 607 (1981);

Tennessee—Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984);

Texas—Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985);

Virginia—Bowman v. State Bank of Keysville, 229 Va. 343, 297 S.E.2d 797 (1985);

Washington—Thompson v. St. Regis Paper Co., 102 Wash. 219, 685 P.2d 1081 (1984);

West Virginia—Harless v. First National Bank, 169 W.Va. 673, 289 S.E.2d 692 (1982);

Wisconsin—Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

AMICUS CURIAE

BRIEF

No. 87-259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JONNA R. LINGLE,
Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

ROBERT E. WILLIAMS *
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-259

JONNA R. LINGLE,
Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as amicus curiae in support of the respondent. The parties' written consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its mem-

bership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed of experts in the practical, as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to various employment and labor laws, including Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1982), which authorizes suits to enforce collective bargaining agreements and preempts certain state causes of action arising out of employment relationships that are governed by such agreements. *See Franchise Tax Board v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983). Many EEAC members are themselves parties to collective bargaining agreements that contain "just cause" provisions and grievance and arbitration procedures similar to those involved in the case at bar. Moreover, many EEAC members conduct business in states whose legislatures or courts have undertaken to provide remedies for "wrongful" or "retaliatory" discharge that potentially overlap and/or conflict with the rights and remedies provided for in such collective bargaining agreements.

Thus, EEAC members have a substantial interest in the issue presented for review in this case—*i.e.*, whether the federal labor policies embodied in Section 301 require preemption of a state-law cause of action for "retaliatory" termination of an employment relationship that is defined and governed by a collective bargaining agreement which provides for

arbitration as the exclusive procedure for resolving disputes, including any dispute over whether or not the challenged termination was for "just cause."

Because of its interest in the issues surrounding Section 301 preemption and state law claims involving termination of employment relationships, EEAC filed a brief as amicus curiae in *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987). Earlier, the National Foundation for the Study of Equal Employment Policy, the educational foundation associated with EEAC, published a monograph dealing with these issues, entitled *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (1986). Over the years, EEAC has filed amicus curiae briefs with this Court in a number of other cases dealing with the interrelationship between federal and state employment laws, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preemption); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (Title VII preclusion); and the relationship between nondiscrimination laws and collective bargaining agreements, *e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (Title VII backpay and seniority); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (Title VII and a seniority system); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (Title VII and a grievance limitations period).

EEAC's interest in this case lies in its desire that the processes of collective bargaining and arbitration not be undermined by an unduly narrow interpretation of the preemptive force of Section 301 which will allow persons in states that permit individual causes

of action for "wrongful" or "retaliatory" discharge to resort to the state courts to resolve disputes more properly addressed through mutually agreed-upon grievance procedures.

STATEMENT OF THE CASE

The facts, as set forth more fully in the court of appeals' decision (Pet. App. 2a-3a), may be summarized briefly as follows:

The plaintiff, Lingle, was employed by Norge Division of Magic Chef ("Norge") pursuant to a collective bargaining agreement between Norge and Machinists Local 554. The agreement provided that individual employment relationships thereunder would not be terminated without "just cause." (Art. 26.2). It also established a mandatory grievance and arbitration procedure that was to be the exclusive means of resolving all disputes about "the effect, interpretation, application, claim of breach or violation of this Agreement." (Art. 8.5).

In December 1984, Norge terminated Lingle's employment on the ground that she had filed a false workers' compensation claim. Lingle, through her union, immediately filed a grievance protesting the company's action. She ultimately prevailed in arbitration of the grievance and was awarded reinstatement and back pay. While her grievance was pending, however, she also filed this lawsuit in state court, alleging that she had been discharged in violation of Illinois law for exercising her rights under the state workers' compensation statute.

Norge removed the case to federal district court based on diversity of citizenship, and then moved to dismiss the complaint on the ground that Lingle's

state-law claim was preempted under Section 301. The district court, citing this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), granted the motion to dismiss, holding that the retaliatory discharge claim was "inextricably intertwined" with the collective bargaining agreement. The Court of Appeals for the Seventh Circuit, in an *en banc* decision, affirmed the dismissal. (Pet. App. 28a-29a).[1]

SUMMARY OF ARGUMENT

Federal labor policy strongly favors private resolution of disputes over the employment rights of workers covered by collective bargaining agreements. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The rationale underlying this policy applies with perhaps its greatest force when the dispute concerns the legitimacy of an employer's reasons for firing an employee covered by a contractual "just cause" provision. Few subjects, if any, are of more fundamental concern to the parties to such an agreement than the grounds on which employment may be terminated.

To an important degree, a "just cause" provision defines the boundaries of the employment relationships governed by a collective bargaining agreement. Any dispute over the legitimacy of a discharge of a person employed under such an agreement is, therefore, by its very nature, "inextricably intertwined" with the terms of the collective bargaining agree-

---

[1] Chief Judge Bauer and Circuit Judges Cummings, Wood, Posner, Coffey, Easterbrook and Manion joined in the opinion of the court written by Circuit Judge Flaum. Circuit Judges Ripple and Cudahay dissented.

ment. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

To the extent that state law purports to give discharged bargaining unit members independent causes of action for "wrongful" or "retaliatory" termination of such employment relationships, it invades this traditional province of collective bargaining and undermines the federal labor policy favoring private dispute resolution. If each state were free to impose any limitations its legislators or courts saw fit on the grounds on which private employment relationships could be terminated, the system of industrial self-government envisioned by federal law could be largely bypassed in favor of state regulation.

This danger is especially acute where, as here, the state law provides more generous remedies for retaliatory or wrongful discharge than the employees could obtain through the grievance and arbitration procedures agreed to by their bargaining representative. The greater incentive to pursue state remedies negates two of the principal features which federal policy values in private arbitration—its exclusivity and its finality.

The federal courts must, therefore, decide how far states can go in establishing causes of action for improper discharge that are independent of, and not preempted by, the federal law governing collective bargaining agreements pursuant to Section 301 of the Labor Management Relations Act. While this Court cautioned in *Allis-Chalmers* that not "every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement,

necessarily is preempted by Section 301," 471 U.S. at 220, it also made clear that "the policies that animate Section 301 . . . require that 'the relationships created by a [collective bargaining] agreement' [be] defined by application of an evolving federal common law grounded in national labor policy." *Id.* at 210-11 (brackets in original), quoting from *Bowen v. United States Postal Service*, 459 U.S. 212, 224-225 (1983). *See also Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962).

The task before the Court now is to provide further guidance to the lower courts in where to draw the line defining those aspects of employment relationships which the states can regulate independently without intruding too far into the zone reserved for private, collectively-bargained dispute resolution procedures. We suggest that the proper approach must begin with the recognition that it is *federal*, not state, law that governs where that line is to be drawn. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Therefore, when a state law or regulation invades the province of collective bargaining and purports to limit or usurp the authority of unions and employers within that state to define the scope and terms of employment relationships covered by their collective agreements, that law or regulation must have some discernible foundation in a *federal* statute or policy, or it cannot overcome the preemptive force of Section 301.

Under this approach, certain state causes of action for termination of employment need not give way to collectively-bargained dispute-resolution procedures, because they relate to matters which Congress, by clearly-evinced intent, has taken out of the exclusive

realm of collective bargaining and arbitration. Examples include state causes of action for discrimination based on race or other protected characteristics (as authorized, for example, by Section 708 of Title VII, 42 U.S.C. § 2000e-7), or violations of state minimum wage or safety and health standards. *See DeCanas v. Bica*, 424 U.S. 351, 356 (1976). In these specific areas, federal law provides a clear warrant for government intrusion into the system of private dispute resolution.

Where federal law provides no signal that collectively-bargained remedies were not to be exclusive, however, state laws purporting to limit the reasons for which an employer can fire an employee must be preempted under Section 301 in order to prevent piecemeal, state-by-state displacement of the system of industrial self-government envisioned by our federal labor policy.

In this case, the court of appeals ruled correctly that Lingle's claim for "retaliatory discharge" fell within the ambit of Section 301's preemption. Unlike employment discrimination, retaliation against workers' compensation claimants is not one of those exceptional areas in which there is a clearly discernible federal predicate for governmental intrusion into the domain of collective bargaining. On the contrary, although federal law does not condone such retaliation or prohibit states from enacting remedies against it, there is no federal statutory or common law policy suggesting that such state regulations may take precedence over the right of the parties to a collective bargaining agreement to decide between themselves what constitutes "just cause" for discharge and what the remedies should be.

Accordingly, the courts below properly declined in this case to create an additional exception to the general rule that employment relationships created and defined by collective bargaining agreements must be governed by the application of federal, not state law. The *en banc* decision of the Seventh Circuit holding that the petitioner's state-law claims were preempted by federal law therefore should be affirmed.

ARGUMENT

THE COURT BELOW CORRECTLY RULED THAT THE FEDERAL LABOR POLICIES EMBODIED IN SECTION 301 REQUIRED PREEMPTION OF PETITIONER'S STATE-LAW ACTION ALLEGING "RETALIATORY" TERMINATION OF AN EMPLOYMENT RELATIONSHIP THAT WAS DEFINED AND GOVERNED BY A COLLECTIVE BARGAINING AGREEMENT.

A. Introduction

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219-220 (1985), this Court reaffirmed the strong federal policy favoring arbitration over state court litigation as the preferred means of resolving employment disputes arising in the context of collective bargaining agreements, and made clear that this federal policy prevails even if the issue in dispute is framed entirely in terms of state law. As the Court explained, "[t]he need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*," which established that state rules purporting to define the meaning or scope of rights under a collective bargaining agreement are preempted by federal law under Section 301 of the LMRA. 471 U.S. at 219, citing to

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

In language that seemed to anticipate the case now at bar, this Court's unanimous opinion in *Allis-Chalmers* pointed out that:

> Since nearly any alleged willful breach of contract can be restated as a tort claim . . . , the arbitrator's role in every case could be bypassed easily if § 301 is not understood to preempt such claims. Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract.

471 U.S. at 219 (emphasis added). A rule that permitted this result must be rejected, the Court said, because it would "cause arbitration to lose most of its effectiveness." *Id.* at 220.

The petitioner in this case, however, focuses on other language in *Allis-Chalmers* indicating that Section 301 does not preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Pet. for Cert. at 10, citing to 471 U.S. at 212. Attempting to fit her case into this non-preempted category, the petitioner argues that her action for "retaliatory" termination of her employment with Norge "is independent of a labor contract, and . . . would exist whether or not she were covered by a bargaining agreement . . . ." Pet. at 10.

The petitioner's argument thus hinges on an attempt to portray her state-law "retaliatory discharge" claim as wholly independent from, and unrelated to, the collective bargaining agreement between her employer and her union. As we show below, however, under long-settled principles of federal labor law, the petitioner's employment relationship with Norge was defined and governed primarily by the collective bargaining agreement. The "just cause" provision—the parties' mutual understanding as to the grounds on which employment could be terminated—was part and parcel of that agreement, as was their commitment to resolve through arbitration any questions about what would constitute valid grounds for discharge and what the remedies for violation would be. Hence, any provision of state law that purported to impose other, "independent" limits upon the grounds on which employees could be discharged necessarily had a direct bearing on the substance of the collective bargaining agreement itself. Thus, the distinction which the petition attempts to draw between her state-law and contractual rights is ultimately illusory; in fact, the two are "inextricably intertwined," 471 U.S. at 213.

The court below was correct, therefore, in holding that a claim that an employer has wrongfully terminated an employment relationship defined by a collective bargaining agreement "necessarily implicates" that agreement and is therefore preempted under Section 301. Indeed, to rule otherwise would invite each state to decide separately which aspects of employment are to be regulated by "independent" state laws and which are to be left open to collective bargaining—a system of preemption-in-reverse that would be totally at odds with the principles underlying the federal preemption doctrines under both Section 301 and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

B. Petitioner's State-Law Claim for "Retaliatory" Termination of Her Employment Relationship with Norge Was "Inextricably Intertwined" with the Collective Bargaining Agreement, Which Defined That Relationship and Governed the Circumstances Under Which It Could Be Terminated.

As noted above, Lingle's employment relationship with Norge was governed by a collective bargaining agreement which provided that the relationship would not be terminated without "just cause" and that all disputes, including disputes about what constituted proper grounds for discharge, would be decided through a binding arbitration procedure. Thus, the scope and limits of Lingle's employment with Norge —including the terms and conditions under which it could be terminated—were defined primarily by the contract negotiated between her employer and her exclusive bargaining representative.

In these circumstances, any question about the legitimacy of a decision by Norge to terminate Lingle's employment clearly was a matter "inextricably intertwined" with the terms of the collective bargaining agreement. *Allis-Chalmers*, 471 U.S. at 213. Termination of her employment would end the mutual obligations Norge and Lingle shared by reason of that agreement. And to the extent that provisions of state statutory or common law could be interpreted as limiting Norge's right to terminate Lingle's employment, they necessarily would affect the substantive meaning of the collective bargaining agreement; specifically, the state law provision would effectively alter the scope of the "just cause" article.

This Court recognized in *Allis-Chalmers* that the policies underlying Section 301 "require that 'relationships cretated by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.'" 471 U.S. at 210-211, quoting from *Bowen v. United States Postal Service*, 459 U.S. 212, 224-225 (1983). These "relationships" include not only the overall bargaining relationship between the employer and the union, but also the individual employment relationships between the employer and the employees in the unit covered by the agreement. For, as this Court long ago observed, "[t]he rights of individual employees . . . are a major focus of the negotiation and administration of collective bargaining contracts." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Indeed:

> Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforcement of the collective bargaining agreement on which they are based.

Id. Thus, the collectively-bargained agreement that Lingle's employment with Norge could be terminated with, but only with, "just cause" as determined in the final analysis by an arbitrator, not only established a vital term of her individual employment relationship with the company, but also bore important implications for the ongoing relationship between the company and her bargaining representative.

The interrelationship between collectively-bargained employment rights and individual employment rights has long been a focus of interest under federal law. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court recognized a substantial area of overlap be-

tween the two. The Court observed that a collective bargaining agreement

> may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and services, which do not themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.

Thus, although an individual such as Lingle may have certain employment-related rights independent of a collective bargaining agreement, *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2431 (1987), the basic terms of her employment "have been traded out," *J. I. Case*, 321 U.S. at 335, and the legal contours of the individual employment relationship have been fixed by the collective agreement.

Where a collective bargaining agreement exists, moreover, other legal provisions that purport to attach "independent" rights or protections to individual employment relationships inevitably will affect the substance and meaning of the collective bargaining agreement itself. This is true whether those other legal provisions take the form of individual contracts or "independent" statutory or common law rights. It is particularly so when the other legal provisions in question purport to prescribe the very grounds on which the employment relationship itself can be terminated. Thus, while such other legal provisions are not necessarily superseded in every case by the collective bargaining agreement, *Caterpillar*, 107 S.Ct. at 2431, it cannot reasonably be said that they do

not affect the substance and meaning of the bargaining agreement.[2]

Parties to a collective bargaining agreement, of course, may not by their private agreement "oust[] any inconsistent state regulation" or "except themselves from whatever state labor standards they disfavor[]." *Allis-Chalmers*, 471 U.S. at 212. But neither are the states entirely free to impose whatever labor standards and regulations they see fit, thereby usurping the basic authority of unions and employers to establish terms and conditions of employment through collective bargaining. Rather, as this Court noted in *Allis-Chalmers*, the "full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." 471 U.S. at 220.

Thus, contrary to the petitioner's suggestion, this case cannot be decided on the basis of some facile distinction between claims that are substantially dependent on interpretation of a collective bargaining

---

[2] This Court's holding in *Caterpillar* does not require a contrary conclusion. The Court expressly refrained from intimating any view on the merits of any of the preemption arguments raised in that case. 107 S.Ct. at 2433 n.13. It held only that a discharged employee's state law claim based on an individual contract of continued employment allegedly entered into at time when he was temporarily serving outside a unit covered by a collective bargaining agreement was not a claim "arising under" federal law for purposes of removal jurisdiction. 107 S.Ct. at 2433. Thus, not only was the collective bargaining agreement not the operative document in *Caterpillar*, but the main issue there—the removability of the suit from state to federal court—is not present here, since removal in the instant case was based on diversity of citizenship.

agreement and claims that are based on "independent" state law. Such a distinction may work for deciding whether particular claims "arise under" federal law for purposes of removal jurisdiction (e.g., *Caterpillar*), but it does not afford a satisfactory basis for deciding the merits of preemption issues. Rather, as shown above, for purposes of the merits, the distinction ultimately is illusory. Claims growing out the termination of an employment relationship simply cannot be that neatly compartmentalized in most cases.

Instead, as the Seventh Circuit majority properly recognized in its *en banc* decision below, this case required the drawing of a line based upon a careful analysis of *federal* labor policies and how they would be affected by a rule that allowed the states, "through the guise of the worker's compensation laws, to circumvent the arbitration and grievance procedures envisioned by Congress as exclusive." Pet. App. 28a. As we show in the following section, established federal labor policies amply support the Seventh Circuit's conclusion that the claim asserted by Lingle in this case was preempted.

C. Lacking Any Discernible Foundation in Federal Law or Policy, the State's Intrusion into the Province of Collective Bargaining to Establish An "Independent" Cause of Action for Retaliatory Discharge Must Be Preempted to Preserve the Federal Scheme of Industrial Self-Government.

As discussed above, the federal labor policies embodied in the Labor Management Relations Act favor a system of private sector industrial self-government implemented through collective bargaining and negotiated dispute-resolution procedures. To make this

system work, it necessarily must be federal law that ultimately defines the scope of collective bargaining and determines what aspects of employment relationships are to be subject to that process.

To be sure, states retain some authority to "proscribe conduct, or establish rights and obligations, independent of a labor contract," *Allis-Chalmers*, 471 U.S. at 212, even where, as here, a unit of employees has voluntarily chosen to have their employment terms and conditions set by collective bargaining. But this state authority cannot be viewed as unlimited. If it were, zealous state officials could effectively supplant the entire collective bargaining process, replacing employment rights and obligations established at the bargaining table with terms and conditions decreed in the legislatures and courts.

A state could, for example, effectively take seniority rights off the negotiating table by enacting legislation requiring employers to credit length of service in a particular manner. Or it could impose restrictions on when and how employees could be disciplined or discharged, thereby displacing shop rules developed through private negotiations and arbitrations. Indeed, a state could simply enact its own "no discharge without just cause" law. Without some federally-imposed limit, the whole gamut of issues relating to "wages, hours, and other terms and conditions of employment," (NLRA Section 8(d), 29 U.S.C. § 158(d)), could be removed from the collective bargaining table, except to the extent that the states chose not to act. This would effectively put the states, rather than federal authorities, in charge of determining what issues would be subject to collective bargaining—a system of preemption-in-reverse that Congress clearly never contemplated.

Ultimately, the only way to prevent such piecemeal displacement of collective-bargaining and arbitration is for this Court to make clear that, to survive federal preemption under Section 301, state-imposed limitations on terms and conditions of employment must have some discernible predicate in a *federal* law or policy indicating that such preemption was not intended.

This approach is fully consistent, not only with the policies underlying Section 301, but with this Court's prior decisions dealing with the relationship between arbitration and other employment remedies. For example, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in holding that an employee's right to bring suit for discrimination under Title VII was not foreclosed by prior resort to arbitration, this Court stressed that Title VII and other *federal* legislation expresses a clear policy "to accord parallel or overlapping remedies against discrimination." *Id.* at 48. The Court pointed out that "Title VII provides for consideration of employment-discrimination claims in several forums," including state and local agencies as well as federal courts. *Id.* Moreover, in enacting Title VII, the federal government specifically allowed the states to adopt independent prohibitions against discriminatory employment practices going beyond those contained in the federal law, as long as they were not inconsistent therewith. 42 U.S.C. § 2000e-7. *See also California Federal Savings & Loan Ass'n v. Guerra*, 107 S.Ct. 683 (1987). Thus, there is a readily apparent basis in federal policy to conclude that state law remedies for employment discrimination need not be preempted in order

to preserve the collective bargaining system as Congress envisioned it.

Similarly, this Court's holding in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), that an employee's claims for wages under the Fair Labor Standards Act are not barred by prior submission of their grievances to contractual dispute-resolution procedures, was predicated on its finding that the FLSA embodied an overriding federal policy to give workers specific minimum wage protections which could not be waived through individual or collective bargaining. *Id.* at 740. Also, as with Title VII, Congress in enacting the FLSA allowed for state laws establishing higher minimum wage requirements that would not be preempted. Thus, here again, federal law provides a clear indication that governmental regulation of minimum wage standards, at either the federal or state level, is not to be considered an unwarranted intrusion into the realm of collective bargaining.

This Court has likewise upheld state laws in other employment-related areas in which federal policy establishes a predicate for state regulation, including child labor and occupational safety and health, *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 725 (1985) (State law requiring inclusion of certain mandatory minimum health care benefits in group health insurance policies not preempted by NLRA).

On the other hand, in the absence of such a clearly discernable basis in federal policy, this Court has held that a state law could not be applied to "prevent the contracting parties from carrying out their [collective bargaining] agreement upon a subject matter

as to which federal law directs them to bargain." *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). In so holding, the Court observed that:

> Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, . . . We believe that *there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions.*

358 U.S. at 296 (citations omitted, emphasis added).

Similarly, in the case at bar, Norge and Lingle's bargaining representative, in response to their federally-imposed duty to bargain over wages, hours and working conditions, had worked out an agreement as to the circumstances under which her employment relationship could be terminated, and how disputes over such terminations would be resolved and remedied. Illinois law, however, would take these matters out of their hands and impose its own solutions whenever it is alleged that a termination was in retaliation for the filing of a workers' compensation claim. We submit that the state law must be preempted in these circumstances, because the requisite federal predicate for such state displacement of available, collectively-bargained remedies for allegedly unjust discharges is lacking in this specific subject area.

To be sure, federal law recognizes the right of states to establish workers' compensation schemes.

Indeed, 28 U.S.C. § 1445(c) makes a civil action brought in a state court under the workers' compensation laws of such state nonremovable to the federal courts. And while there may be nothing in federal law or policy to prevent a state from enacting remedies against retaliatory discharge of workers' compensation claimants, neither is there any suggestion in federal law or policy that such state remedies for retaliatory discharge are to overlap with or take precedence over remedies for discharge without "just cause" established through collective bargaining. Accordingly, the court below correctly distinguished this suit for retaliatory discharge from cases involving state anti-discrimination remedies, which Congress expressly allowed to "exist within the framework of federal statutes that authorize multiple independent decisions." Pet. App. 29a n.17.

D. Cogent Policy Reasons Support Preemption Of State Law "Retaliatory Discharge" Claims Where Collectively-Bargained Private Mechanisms For Resolving Discharge Disputes Exists.

Important policy considerations support preemption of state law claims such as Lingle's claim for "retaliatory discharge" where an agreed-upon grievance and arbitration procedure exists. First, a rule favoring preemption in these circumstances will serve to "reduce the problem of overlapping and inconsistent remedies for alleged unfair discharge actions." R. Williams and T. Bagby, *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (National Foundation for the Study of Equal Employment Policy

1986) at 62. A contrary policy would have the "disruptive influence" warned against in *Lucas Flour*, 369 U.S. at 103, leading to the "demise of a uniform national labor policy and the rise of fifty individual labor laws." S. Kinyon and J. Rohlik, "*Deflouring Lucas Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 St. Louis U.L.J. 1, 45 (1985). As this Court said in *Allis-Chalmers*, "[e]xclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'" 471 U.S. at 211, citing *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962).

This Court also observed in *Allis-Chalmers*, at 211, that if state law were used to determine the parties' rights with respect to matters governed by a collective bargaining agreement, "all the evils addressed in *Lucas Flour* would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances." Consequently, "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Id.*

An additional reason given in *Allis-Chalmers* for "holding that Congress intended § 301 to pre-empt this kind of derivative tort claim" was that "only that result preserves the central role of arbitration in our 'system of industrial self-government.'" *Id.* at 219, quoting *Warrior & Gulf*, 363 U.S. at 581. Like Lueck, if Lingle "had brought a contract claim under § 301, [s]he would have had to [complete] the arbitration procedure established in the collective-bargaining agreement before bringing suit in court."

471 U.S. at 219. To allow her to proceed directly to court to challenge her discharge, "without first exhausting the grievance procedures established in the bargaining agreement," *id.*, would undermine the effectiveness of arbitration, and thus defeat one of central objectives of federal labor policy.

Finally, a rule preempting claims such as Lingle's, which can readily be decided through agreed-upon private dispute resolution mechanisms, has important practical advantages. "The grievance and arbitration process generally provides a quicker and less expensive means of redress and avoids further expansion of the already excessive caseload in our state and federal courts." Williams and Bagby at 44. This "explosive" expansion of "essentially federal" claims in the state courts is a matter of substantial concern to employers, *id.* at 2, and an affirmance of the Seventh Circuit's holding in this case will help to prevent further exacerbation of the problem.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Court of Appeals' decision be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS *
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment Advisory Council

* Counsel of Record

January 22, 1988

AMICUS CURIAE

BRIEF

No. 87-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH
Counsel of Record
DIXIE L. ATWATER
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Avenue, N.W.
Suite 230
Washington, D.C. 20036
(202) 887-0855

Counsel for the Chamber of Commerce of the United States of America,
Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-259

JONNA LINGLE,

Petitioner,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the in-

---

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36(2). Letters of consent are on file with the Clerk of the Court.

terests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court. E.g., *Golden State Transit Corp. v. Los Angeles*, 475 U.S. ——, 89 L. Ed. 2d 616 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202; *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979).

This case presents the question of whether an employee's state law claim for wrongful discharge is preempted by Section 301 of the Labor Management Relations Act where that employee is covered by a collective bargaining agreement which provides for final and binding arbitration of employees' claims that they have been discharged without just cause. Specifically, the Court must determine whether an employee who has successfully challenged her discharge through the grievance-arbitration procedure may nevertheless continue to challenge that same discharge in state court based on the claim that the discharge was also "wrongful" under state law.

This issue is of vital concern to the Chamber and its members, many of whom are parties to collective bargaining agreements with "just cause" and mandatory arbitration provisions and are also subject to various state laws and doctrines which may permit employees to challenge discharges in a judicial forum. Unless the judgment of the Seventh Circuit is upheld, these employers will be routinely required to litigate employee discharge claims in multiple forums. Such multiple forum litigation may well force employers to dispense with the forum they *can* avoid--arbitration—even though arbitral procedures provide the quickest, easiest and least expensive method of fairly adjudicating employees' discharge

claims. This, in turn, would ultimately operate to the detriment of the system of labor-management relations that has served employers and employees well in the over fifty years since the National Labor Relations Act was passed. Accordingly, the Chamber submits this brief *amicus curiae* urging the Court to affirm the judgment of the Seventh Circuit and hold that the Petitioner's state law claim for wrongful discharge is preempted by federal law.

SUMMARY OF THE CASE

The relevant facts in this case are straightforward and undisputed. Petitioner Jonna Lingle was employed by Norge Division of Magic Chef, Inc. ("Norge") and was covered by a collective bargaining agreement that protected employees from discharge without just cause (Pet. App. 2a-3a). The agreement also provided that the contract's grievance and arbitration procedures were to be the exclusive remedy for all disputes (*id.*).

Lingle was discharged from Norge in late 1984 on the ground that she had filed a false worker's compensation claim against Norge. Lingle contested that discharge, asserting that she had been discharged in retaliation for filing a worker's compensation claim (*id.*). Her grievance relating to that discharge was ultimately heard by an arbitrator who upheld the grievance and ordered Lingle reinstated with backpay (*id.*).

While Lingle's grievance was being processed, however, she also filed suit in Illinois state court alleging that she had been discharged in violation of state law. Specifically, Lingle asserted that she has been subjected to "retaliatory discharge" for filing a worker's compensation claim, a state tort which had first been created by the Illinois Supreme Court in 1978 (*Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353), and which had been extended to union-represented employees by the same court in 1984 (*Midgett v. Sackett-Chicago, Inc.*, 105

Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985)). Pet. App. 6a-7a.

The state court action was removed to the federal courts on the basis of diversity, and the Seventh Circuit ultimately ruled, *en banc*, that because Lingle's claim could have been (and was) arbitrated under the collective bargaining agreement covering her, her state action was preempted by Section 301 of the Labor Management Relations Act ("LMRA")—the section providing for enforcement of collective bargaining agreements. Pet. App. 1a-47a. The court reasoned that Lingle's common law claim for wrongful discharge necessarily implicated and was thus inextricably intertwined with the collective bargaining agreement because the agreement expressly prohibited Norge from discharging Lingle without just cause. Further, the court recognized that a refusal to preempt such state claims would permit employees and states to circumvent the grievance-arbitration procedures in collective bargaining agreements, which would operate to the substantial detriment of federal labor policy. Accordingly, the court dismissed Lingle's state claim as preempted by federal law.

SUMMARY OF ARGUMENT

The instant case has far broader implications than Petitioner and her *amici* suggest. Although Lingle's state claim is based on a clear expression of state law, this Court's acceptance of her analysis would permit employees to pursue hundreds of potential state wrongful discharge claims premised upon whatever nebulous and vague "public policies" the fifty states and their judiciaries might at some point deem worthy of protecting through limitations on employee dismissal. Because such claims would all, no doubt, be resolvable through arbitration under "just cause" discharge provisions of labor agreements, Lingle is asking this Court to recognize an almost limitless "exception" to Section 301 preemption.

Federal labor policy will not permit such wholesale disregard of collective bargaining agreements and their mandatory grievance-arbitration provisions. This Court has long recognized that the preeminence of such agreements, and arbitration provisions in particular, is necessary to the system of industrial self-government that our labor laws are designed to foster. As a consequence, state claims that are inextricably intertwined with matters of contract interpretation or that would substantially undermine the arbitral process are preempted by federal law and cannot be permitted to proceed as state claims.

Lingle's state claim must be preempted on both grounds. Her claim is inextricably intertwined with matters of contract interpretation because it is a claim that could have been (and was) resolved by final and binding arbitration under the collective bargaining agreement covering Lingle. Furthermore, the result is the same even if the Court takes the opposite approach and analyzes the state tort rather than the reach of the contractual arbitration provision. Every claim for wrongful discharge that is successfully litigated in court necessarily reflects a determination that the plaintiff was *not* discharged for just cause, and that is the very issue the parties have agreed to submit to arbitration. Moreover, the viability of an employer's proffered reasons for discharging an employee will inevitably require interpretation of the collective bargaining agreement and the parties' practices thereunder. Those are matters that the parties have committed to the judgment of an arbitrator, but that, under Lingle's analysis, would be determined, instead, by fifty state judiciaries.

Finally, permitting state wrongful discharge actions as a parallel means of challenging the dismissal of union-represented employees is likely to have a devastating effect on the arbitral process. For almost 30 years this Court has jealously guarded that process by refusing to let employees bypass that procedure or the judiciary

second-guess it. If the Seventh Circuit judgment is reversed, all of that protection will have been for naught, because state courts will be permitted to routinely issue decisions on matters that could have been, should have been, and maybe even were submitted to arbitration. This, in turn, will almost inevitably make arbitration meaningless in the context of employee discharge. For all of these reasons, the judgment of the Seventh Circuit should be affirmed.

ARGUMENT

FEDERAL LABOR POLICY AND SECTION 301 OF THE LMRA REQUIRE THAT STATE WRONGFUL DISCHARGE CLAIMS BE PREEMPTED

A. The Scope and Implications of the Issue

Before turning to a discussion of the preemption principles governing this action, the Chamber believes it appropriate to explain more fully the scope and implications of the issue the Court faces in this case. In particular, we wish to dispel the notion, fostered in the briefs of the Petitioner and her *amici*, that this case presents only a very narrow issue relating to one special type of state law claim and hence that permitting such claims to go forward would cause only a limited intrusion into the federal labor policy favoring arbitration and the collective bargaining process. As shown below, this case promises a far broader impact than these parties suggest.

In their briefs to this Court, the Petitioner and her *amici* suggest that Lingle's state claim is not a "general" wrongful discharge claim, but rather seeks to vindicate a special breed of wrongful discharge—i.e., a "retaliatory discharge" for filing a worker's compensation claim. They emphasize that some states have enacted specific statutes creating such causes of action, and that other states premise such claims on statutory provisions creating systems of worker's compensation and on the states' "public policy" interest in ensuring unrestrained employee access to those systems. See, e.g., Pet. Br. at 14-15, 23-26, 29; AFL-CIO Br. at 5-11; National Conference Br. at 9-21, 24 and Appendices. Thus, according to Lingle and her *amici*, the state claims here should not be preempted by Section 301 because they involve uniquely "public rights" which are "independent" of the collective bargaining agreement (i.e., allegedly they can be tried and decided without interpreting the agreement).

The problem with this recitation and analysis is that it hardly gives the Court a true picture of what is at stake here. It is true, of course, that Lingle's state law claim alleges a retaliatory discharge involving worker's compensation. Such a claim, however, represents only the tip of the iceberg in terms of the type of state law claims that would be available to union-represented employees if Lingle's arguments before this Court are accepted. In fact, in recent years states have created manifold and infinitely variable limitations on employers' right to discharge employees at will [2] and, under Lingle's analysis, each of those limitations would potentially be available to employees, such as Lingle herself, who otherwise enjoy the broad protection against "unjust dis-

---

[2] "In an attempt to provide employees with some form of protection against certain types of discharge, a clear trend has developed in various legislatures, the scholarly press, and particularly the courts which has resulted in the doctrine of employment-at-will being riddled with exceptions and exemptions depending on the jurisdiction and the focus of each individual case." A. Hill, *"Wrongful Discharge" and the Derogation of the At-Will Employment Doctrine*, University of Pennsylvania Labor Relations and Public Policy Series No. 31, at pp. 13-14 (The Wharton School Industrial Research Unit, 1987) (footnotes omitted). *See generally* H. Perritt, *Employee Dismissal Law and Practice*, at 1-37 (2d Ed. 1987); L. Larson & P. Borowsky, *Unjust Dismissal* (1987).

charge" contained in most collective bargaining agreements.[3]

For example, Lingle's claim is but one of a species that courts and commentators have labeled "public policy torts." A. Hill, *supra* note 2, at 25-37; H. Perritt, *supra* note 2, at 244-288. Such torts involve situations in which an employee's discharge is deemed to contravene some public policy that the state itself has an interest in furthering (here, for example, the worker's compensation system). *Id.* Importantly, however, "public policy" is a nebulous concept that can arguably be extended to whatever actions state judges desire. For example, one of the first courts to address the public policy argument in an employment context stated:

> By "public policy" is intended the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . . [W]hatever contravenes good morals or any established interests of society is against public policy.

Petermann v. Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

Given this indeterminate reach, state courts may recognize wrongful discharge claims premised upon a wide

[3] According to one recent survey, "just cause" provisions were found in approximately 86 percent of all collective bargaining agreements surveyed. BNA Collective Bargaining Negotiations and Contracts, Volume 2, Basic Patterns—Clause Finder, p. 40:1 (BNA 1986). Moreover, many arbitrators will imply a just cause provision even if one does not appear in the contract. Elkouri and Elkouri, *How Arbitration Works*, at 650-653 (4th Ed. 1985). See also *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 917-918 (5th Cir. 1983) (arbitrators typically infer just cause provisions and courts uphold their right to do so). Ironically, the exceptions to the employment-at-will doctrine described in the text were developed primarily to give non-union employees some semblance of the job protection afforded by these just cause provisions. See, e.g., *Armstrong v. Goldblatt Tool Co.*, Kan. S. Ct. No. 59,464, 1987 WL 23932 (Kan. S. Ct. 1987).

variety of amorphous and ill defined "public policies." See, e.g., *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (affirming wrongful discharge claim of employee discharged for indicating her availability for jury duty against her employer's wishes); *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983) (upholding state claim of wrongful discharge by employee dismissed for refusing to aid his employer's lobbying effort on the ground that dismissal contravened the public policy of free speech); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (recognizing wrongful discharge claim for employee allegedly discharged for his efforts to ensure that employer's products complied with labeling requirements); *Wagensellar v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985) (employee allegedly discharged for refusing to "moon" someone had claim for wrongful discharge based on public policy reflected in statutes prohibiting indecent exposure); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (employee could recover for wrongful discharge if his dismissal was premised on his instituting an accurate accounting system in compliance with federal law); *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 923, 436 A.2d 1140, 1145 (1981) (store manager discharged for neglecting store security by leaving money in store safe which was later burglarized; discharge would violate public policy expressed in Occupational Safety and Health Act, since manager's conduct furthered employee safety by not requiring them "to imperil themselves by making bank deposits").

In each of these cases, of course, the states can be said to be implementing "public law," and the resolution of those claims would not be any more "dependent" on a collective bargaining agreement than is Lingle's claim herein. As a consequence, acceptance of Lingle's argument here would give union-represented employees, who already may challenge any discharge under the just cause provisions of their union contracts, an open invitation to

challenge these same discharges in state court based on these and hundreds of other "public policy" theories.

Moreover, acceptance of Lingle's arguments might even enable union-represented employees to pursue state claims premised on other exceptions to the employment-at-will doctrine. For example, some states recognize an implied obligation of "good faith and fair dealing" which attaches to the employment relationship and which has been described as sounding both in tort and contract. *E.g., Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (obligation implied from longevity of employment and existence of procedure for adjudicating disputes); *see generally* A. Hill, *supra* note 2, at 34-37. Under this theory, an employee could challenge his or her discharge in state court on the ground that it was simply unfair or undertaken in bad faith. *Id.* Similarly, some states recognize claims premised upon express or implied contracts which allegedly arise from an employer's oral representations, personnel policies or statements in employee manuals or handboooks. *E.g., Duldulao v. St. Mary of Nazareth Hosp. Center*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987); *see generally* H. Perritt, *supra* note 2, at 171-241. Although the Chamber believes that claims premised upon such theories would be properly preempted by this Court's decisions regarding Section 301, it is not illogical to assume that state court plaintiffs will argue that these claims, too, derive from "public law" state rights, available to all employees, which are "independent" of any collective bargaining agreements covering the plaintiffs. Thus, under Lingle's analysis, these state common law contract and tort/contract claims might provide even more avenues for union-represented employees to challenge unjust discharges.

Finally, of course, state legislatures could authorize, in the "public interest," all manner of wrongful discharge claims providing relief to discharged employees that is inconsistent with or supplemental to provisions of existing

collective bargaining agreements. For example, a large percentage of labor agreements in this country specifically recognize an employer's right to discharge its union-represented employees for such infractions as tardiness, dishonesty or theft, misconduct, insubordination, failure to promptly return to work when recalled from layoff, intoxication on the job, etc. See BNA Collective Bargaining Negotiations and Contracts, Volume 2, Basic Patterns—Clause Finder, pp. 40:1-40:13, 60:421-60:422 (BNA 1986). However, various states could legislate that no employee may be discharged for less than three instances of tardiness in a calendar month, that a discharge of an employee who commits only a misdemeanor by stealing less than $100 worth of an employer's property is improper, that an employee may not be discharged for assault and battery of a supervisor which arises out of a discussion of working conditions, that no laid off employee may be discharged for failure to return to work within one month from notice of recall, that no employee may be fired for drunkenness without first according him or her the right to participate in a company-sponsored alcohol rehabilitation program, etc.[4]

In sum, the Court is considering here not some narrow exception that, if accepted, would permit union-represented employees occasionally to bypass the grievance-arbitration provisions of their collective bargaining agreements. Instead, acceptance of Lingle's argument before this Court will open the floodgates and permit wholesale bypassing of the labor agreement and its arbitral process. We show in the next section why federal labor policy will not countenance that result.

---

[4] Indeed, a number of state legislatures have considered bills to prohibit discharge without "just cause" (A. Hill, *supra* note 2, at Appendix B), and Montana has actually enacted such a statute. Montana Wrongful Discharge from Employment Act, H.B. 241 (July 1, 1987), reprinted in BNA Individual Employee Rights Manual at 567:4-567:7.

B. The Federal Labor Policy Underlying This Court's Decisions Compels Preemption

1. *The Governing Principles*

This Court has long recognized that the fundamental predicate of our nation's labor laws is to foster a system in which employees, through their collective efforts, may come to the bargaining table and negotiate "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960). The outcome of that process—the collective bargaining agreement—thus enjoys a suitably exalted position in our federal labor policy. *Id.* at 578 ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement.").

Consistent with these policies, this Court has held that Section 301 of the LMRA does far more than merely confer jurisdiction on the federal courts to hear disputes relating to the obligations that the parties have assumed in their collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450-451 (1957). Instead, that provision represents a Congressional mandate for the courts to create a uniform body of federal common law relating to such disputes "which the courts must fashion from the policy of our national labor laws." *Id.* at 456. And this uniform federal law, the Court has made clear, "must be paramount [to state law] in the area covered by the statute." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). As a consequence, "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), *quoting Avco Corp. v. Aero Lodge No. 735, IAM*, 390 U.S. 557, 560 (1968). Indeed, "[i]f the policies that animate § 301 are to be given their proper range, . . . the pre-emptive effect of § 301 must

extend beyond suits alleging contract violations" to cover also state tort suits that implicate the application and interpretation of collective bargaining agreements. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). See also *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. ——, 95 L. Ed. 2d 791 (1987).

Paralleling the development of these principles, and indeed animating them, has been the Court's recognition that the grievance-arbitration provisions of collective bargaining agreements are particularly sacrosanct. Since the *Steelworkers Trilogy* decisions in 1960,[5] the Court has emphasized that the express policy of the LMRA[6] "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg. Co., supra*, 363 U.S. at 566. To permit this "full play," for example, an order to arbitrate a dispute cannot be denied unless it is absolutely clear that the arbitration provision cannot be interpreted to cover the dispute. *Warrior & Gulf, supra*, 363 U.S. at 582-583. Furthermore, once a dispute has been arbitrated, the courts may not review the merits of the arbitration award either directly (*Enterprise Wheel & Car Corp., supra*, 363 U.S. at 596) or indirectly through the guise of judging the award under some nebulous public policy standard. *United Paperworkers v. Misco, Inc.*, —— U.S. ——, 108 S. Ct. 364 (Dec. 1, 1987).

Equally important, moreover, for purposes of this case, the Court has made clear that arbitration provisions can

---

[5] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[6] Section 203(d) of the LMRA, 29 U.S.C. § 173(d), states that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application and interpretation of an existing collective bargaining agreement. . . ."

be given their "full play" only if the parties are not permitted to bypass those provisions when they are available. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), the Court stated:

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant . . . . Union interest in prosecuting employee grievances is clear . . . . Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Id. at 653, *quoting Teamsters v. Lucas Flour*, *supra*, 369 U.S. at 103. See also *Allis-Chalmers v. Lueck*, *supra*, 471 U.S. at 219-220.

In short, the fundamental federal labor policies reflected in the sanctity of collective bargaining agreements, and particularly their arbitration provisions, and in the need for a uniform federal system, must guide this Court's determination of whether Lingle's state tort claim is preempted by Section 301 of the LMRA. If the routine adjudication of state wrongful discharge claims would interfere with or frustrate that policy, then they cannot be permitted.

2. *Lingle's Claim*

Although the foregoing fundamental federal labor policies must ultimately guide this Court's decision, the specific analysis of Lingle's claim must involve, to a substantial degree, consideration of *Allis-Chalmers v. Lueck*, *supra*. In that case an employee had filed suit in state court alleging a cause of action under the judicially-recognized tort of bad faith handling of an insurance claim. The Wisconsin Supreme Court upheld that claim even though the insurance policy involved in the case was a disability plan incorporated into a collective bargaining agreement. In so doing, the Wisconsin court concluded that Lueck's claim was not preempted by Section 301 because the state tort claim was independent of any contract claim under the collective bargaining agreement. 471 U.S. at 213.

This Court reversed, holding that Lueck's state tort claim was not sufficiently independent of claims under the collective bargaining agreement to withstand Section 301's preemptive force. The Court reasoned that an evaluation of Lueck's state claim would require a determination of the rights and obligations the parties assumed in the bargaining agreement and that such determination fell precisely within the reach of Section 301. 471 U.S. at 214-219. Moreover, the Court concluded that preempting such claims is the only result that

> preserves the central role of arbitration in our "system of industrial self-government." *Steelworkers v. Warrior & Gulf Navigation Co.*, [*supra*] . . . . Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*. . . .
>
> * * * *

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness. . . .

471 U.S. at 219-220 (emphasis added).

The Chamber submits that this same analysis compels the conclusion that Lingle's claim is preempted. First, contrary to the arguments of Lingle and her *amici*, the instant case is not distinguishable on the ground that it involves "public law" minimum substantive protection by the state that runs to all employees. *Allis-Chalmers*, too, involved minimum substantive protection in the form of positive assurance that persons in the state would be free from bad faith handling of insurance claims. Indeed, virtually every state law imposing "public law norms" could be said to involve "minimum substantive protection" running to all employees or to all citizens in the state, but that does not mean that such provisions are automatically exempt from federal labor preemption. See *Teamsters v. Oliver*, 358 U.S. 283 (1959), where the Court found preempted the application of a state anti-trust statute to a bargaining agreement even though the state law was obviously "independent" of the collective bargaining agreement and provided "minimum substantive protection" to all persons in the state to be free from the effects of illegal price-fixing.[7]

[7] Lingle's characterization of state wrongful discharge claims as involving "minimum substantive protection" running to all employees is an attempt to bring her claim within the reasoning of *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). That effort is unavailing, however, because both the "minimum standards" and the preemption issues involved in that case were fundamentally different from those present here. Specifically, there the Court held that minimum labor standards in the form of mandatory health benefits were not preempted by the NLRA because they did not upset the balance of bargaining power or otherwise intrude on the purposes and policies of that statute. Here, by contrast, the state has not merely specified some level of wages or benefits that must be incorporated into the parties' bargaining agreement. Rather, here the state's alleged "minimum standard" (freedom from wrongful discharge) is effectively the same as that already contained in contractual just cause provisions, but the state is providing an *alternative forum* for the enforcement of that standard. Such alternative enforcement mechanisms run squarely into the teeth of Section 301 preemption and raise issues wholly different from those considered in *Metropolitan Life*.

Second, *Allis-Chalmers* also forecloses the parties' contention that Lingle's claim should be upheld because the state cause of action provides remedies that are not available through arbitration. In *Allis-Chalmers*, as here, the tort theory being pursued by the employee would have permitted the recovery of punitive damages, and presumably Wisconsin's judgment that such damages were necessary to enforce its public policy is entitled to no less deference than the judgment of the State of Illinois.

Third, Lingle's state tort action implicates contract claims and application and interpretation of the collective bargaining agreement in much the same way as did Lueck's in *Allis-Chalmers*. In this regard, an employee who alleges that he or she was subjected to retaliatory discharge for filing a worker's compensation claim (or any other wrongful discharge claim) may challenge that discharge in arbitration under contractual just cause provisions. The employer will presumably contend that the grieving employee was discharged *not* for filing the compensation claim, but rather, because of some shortcoming of the discharged employee. Thus, an arbitrator

will have to decide the "reason" for the discharge, and it is inconceivable that the arbitrator would not uphold the employee's grievance if the employer could not rebut the employee's claim that he was discharged for an impermissible reason—i.e., in retaliation for exercising some state-protected right.[8]

The Seventh Circuit concluded that this fact alone (i.e., the arbitrability of Lingle's claim) was sufficient to require preemption, and the Chamber agrees. See Pet. App. 28a-29a. Indeed, for contractual arbitration provisions to be given the "full play" required by this Court's decisions, an employee's state claim that is cognizable under the contract must be brought under the contractual grievance-arbitration procedure. "To conclude otherwise . . . would allow the states . . . to circumvent the arbitration and grievance procedures envisioned by Congress as exclusive." Seventh Circuit decision, Pet. App. 28a-29a.[9]

---

[8] Employers normally have the burden of proof in arbitrations involving discharge, so an employer facing such a contention would have to affirmatively show that there was just cause for the discharge. Elkouri and Elkouri, *supra* note 3, at 661-670.

In the unlikely event an arbitrator ever held that the parties' agreement *permitted* an employee's discharge for filing a worker's compensation claim (or that the employee had been discharged for that reason but the arbitrator could not consider it), this Court's *Misco* decision would presumably permit a court to vacate the arbitrator's award on public policy grounds. *United Paperworkers v. Misco, supra*. Although Petitioner might argue that such a conclusion supports her contention that her claim should not be preempted because it is grounded in a solid and recognized public policy, there is an important distinction. Under *Misco*, it would be *federal common law*, based on national labor policy, which would determine whether public policy considerations warrant vacating the award. If Lingle's claim is not preempted, however, then fifty state legislatures and judiciaries will be determining what "public policies" warrant bypassing the arbitral process.

[9] It appears that *Allis-Chalmers* itself was premised in part on the fact that the plaintiff's state court claim was arbitrable under his union contract. Thus, in *International Brotherhood of Electrical*

Furthermore, even if one determines preemption by analyzing the discharged employee's state tort claim rather than the reach of his possible contract claims, the same result obtains. Every state court upholding a plaintiff's claim for wrongful discharge must have determined, *a fortiori*, that the plaintiff was *not* discharged for just cause—the very question the parties have committed to arbitration. Moreover, a court's mere consideration of a retaliatory discharge claim by a union-represented employee will require reference to and interpretation of the employee's collective bargaining agreement. Although the court hearing such a claim may not have to determine whether the cause was "just" or not in a *fairness* sense, or even in a contractual sense, the contractual standards relating to discharge will inevitably come into play. In particular, the validity or even the truthfulness of an employer's proffered reasons for a discharge must be judged at least in part by reference to the collective bargaining agreement and the parties' practice which has given life to that agreement. If the employer can establish that the contract gave him the right to discharge for the proffered reasons, and if he has consistently discharged other employees for the same or similar reasons,[10] then as a practical matter the employer has also shown that the discharge was not for

---

Workers v. Hechler, supra, 95 L. Ed. 2d at 800-801, the Court identified two separate reasons for concluding in *Allis-Chalmers* that the state claim would inevitably involve contract interpretation: first, the fact that the contract itself (like state law) may have included an implied obligation of good faith, the existence and breach of which would have to be determined based on federal contract interpretation principles (i.e., it was arbitrable); and second, the fact that one cannot judge whether the state law duty of good faith has been heeded without looking to the labor agreement to determine what rights and obligations the employer retained or assumed in dealing with its employees.

[10] Arbitrators normally consider the consistency of employee treatment an element of "just cause." Elkouri and Elkouri, *supra* note 3, at 684-685.

a retaliatory reason violative of state public policy. These contract questions, however, are matters that the parties' agreement commits to an arbitrator, and our federal labor policy requires that it be the arbitrator who decides them. *Allis-Chalmers, supra.* Accordingly, it is plain that the consideration of Lingle's state tort claim is "inextricably intertwined" (*Allis-Chalmers*, 471 U.S. at 213) with her contract claim and with the application and interpretation of Norge's collective bargaining agreement. As a consequence, it must be held preempted under the analysis of *Allis-Chalmers.*[11]

---

[11] This Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), does not require a contrary result. The Court's conclusion there that the arbitration of discrimination claims does not foreclose subsequent suits under Title VII was premised upon two factors not present here. First, the Court found that Congress itself had "long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47. Second, the Court recognized that arbitration was a less appropriate forum than federal courts for resolving Title VII claims because "harmony of interests" between unions and employees could not always be presumed in claims dealing with Title VII discrimination inasmuch as Congress had deemed it necessary to make Title VII applicable to unions as well as employers in order to correct the historic discriminatory practices of both. *Id.* at 57-58 and n. 19.

Furthermore, neither *Gardner-Denver* nor other federal statutory cases relied upon by Petitioner (e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Atchison, Topeka and Sante Fe Ry. Co. v. Buell*, 480 U.S. ——, 94 L. Ed. 2d 563 (1987)) require the conclusion that claims premised upon state rights are outside Section 301's preemptive reach. The "ultimate touchstone" for determining federal preemption is Congressional intent (*Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)), and in those cases, unlike here, the Court was faced with federal statutes containing specific expressions of Congressional intent that statutory claims in a judicial forum should be permitted. Importantly, moreover, permitting federal statutory claims to go forward despite the availability of arbitration incorporates a vital element of control that would be lacking if state claims are similarly permitted. In the former situation, *Congress itself* determines the areas in which the arbitral forum may be bypassed, whereas in the latter situation that decision is left to the legislatures and judiciaries of the fifty states. Thus, the fact that certain federal statutory rights may supersede grievance-arbitration procedures does not mean that any rights a state may wish to provide should likewise supersede those procedures. See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635-637 (1975) (state, but not federal, antitrust laws preempted by National Labor Relations Act because Congress passed federal laws with an eye to their accommodation with federal labor policy, whereas the several states pass such laws without consideration of federal labor policy objectives).

Finally, of course, and again as in *Allis-Chalmers*, a failure to preempt Lingle's claim would deal a devastating blow to the preservation of the arbitral process. The arbitration of discharge and discipline grievances is the backbone of that process, and hence of our system of industrial self-government. In fact, in cases administered by the American Arbitration Association, discharge and discipline grievances constitute the single largest category of issues arbitrated, with those issues being involved in almost three times more arbitrations than any other issue. *Study Time, A Quarterly Letter of News and Comment for the AAA Labor Arbitrator*, American Arbitration Association, at p. 4 (April 1986).

Moreover, as shown in Section A, *supra*, a refusal to preempt Lingle's claim will not result in some minor, isolated intrusion into the arbitral process. Rather, given the breadth and variation of state wrongful discharge theories, one could expect wholesale state claims by employees who are unhappy with the arbitral outcome or who have decided to bypass it completely.

Th~ coalescence of these factors places the instant case at the forefront of an all-out assault on the arbitral process. It is an assault that cannot but frustrate the federal scheme of labor-management relations that has served this country well for over fifty years. In these circumstances, the Chamber submits, state wrongful discharge claims should be preempted even if they were not inextricably intertwined with matters of contract interpretation—an issue expressly left open in *Allis-Chalmers.*

471 U.S. at 217 n. 11. Certainly there should be no doubt about the conclusion when this arbitral impact is coupled with the fact, as shown above, that such claims do inevitably involve contract interpretation. Accordingly, Lingle's state claim for wrongful discharge should be preempted.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to affirm the judgment of the Seventh Circuit and hold Lingle's claim preempted by Section 301 of the LMRA.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH
Counsel of Record
DIXIE L. ATWATER
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Avenue, N.W.
Suite 230
Washington, D.C. 20036
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America, *Amicus Curiae*

Dated: January 23, 1988